# INDEX


| | PAGE. |
|---|---|
| Defective limbers | 1 |
| The charter-party | 2 |
| Are the defects trifling? | 4 |
| Duty to try tank | 7 |
| Law of ballast tanks | 8 |
| Day when leak was discovered | 9 |
| Distinct causes of damage | 10 |
| Construction of exceptions in a bill of lading | 10 |
| Shipowners' personal duties as distinguished from their liability for acts of their servants | 12 |
| What are latent defects? | 14 |
| These principles applied to the *Carib Prince* | 17 |


## Appendix.

### French Authorities.


| | |
|---|---|
| Lyon-Caen, Traité de Droit Maritime | 20–21 |
| Boutard, Des clauses de non-responsabilité | 20–21 |
| Owner of steamer *Cid* held liable for damage to cargo from defect in equipment (Ct. of Cassation) | 22–23 |
| Owner of steamer liable personally for defective engine | 24–25 |
| Owner of steamer *Versailles* liable for not closing valve of discharge pipe, and not having bulkheads and doors water tight (Paris Ct. of Appeal) | 26 |
| Same case in Ct. of Cassation holding that the bill of lading did not apply to such fault of the owner | 36–39 |
| Owner held liable for insufficient equipment, notwithstanding negligence clause (Tribunal Hâvre) | 40–43 |


### Belgian Decisions of Court of Cassation.


| | |
|---|---|
| Owners of *Knight Templar* held liable for defective water tank and obstructed limbers. Owners could not exonerate themselves therefor | 44–49 |
| Owner of *Rothwell Castle* held liable for leak from tunnel into hold, and stopping pumps, notwithstanding negligence clause in bill of lading | 50 |
| Owner of steamer *Harter* held liable for not prohibiting captain from loading in a defective hold | 56–59 |

GERMAN AUTHORITIES.

Shipowner not allowed to shift on others the duty to make his vessel seaworthy. Deliberation of the Commissioners of German Commercial Code.... 60, 61

Latent defects are those impossible to be discovered. Citation from the *Seerecht* of Lewis, Reatz and Schroeder..... 60, 61

Latent defects—Vessel having been surveyed and classed not proof of diligence—Obligation of seaworthiness. Decision of Imperial Court (Penny *v.* Ehlers) Mch. 17, 1894..... 62, 67

Liability of shipowner for filling ballast tank with manhole open. Hanseatic Court of Appeal and Imperial Court (The *Castleventry*)..... 68, 85

Liability for leak from defective feed pipe. Duty to guard water pipes, and search for defects. Hanseatic Court of Appeal (The *Bellona*), Jan'y 30, '92..... 86, 95

# SUPREME COURT OF THE UNITED STATES

JOSEPHINE W. WUPPERMANN
AGAINST
The steamship CARIB PRINCE } No. 45

## SUPPLEMENTAL BRIEF FOR THE APPELLANT UPON RE-ARGUMENT.

The examination of the record in the courts below discloses a clear case of damage to cargo unattended with storm, stress of weather, or other *vis major*. Libellant's cargo has been damaged by water ballast carried in a tank, high above the level of the cargo. The causes of this damage were plainly the unfitness of the bulkhead or after side of the tank through a defective rivet, and the failure of the water clearances to act properly in the cargo compartment, so as to let the water escape through the limbers in the bilges.

It is not denied that the loss is wholly due to this unfitness of the vessel—a faulty and unseaworthy condition existing at the beginning of the voyage.

### THE DEFECTIVE LIMBERS.

Both courts have held the *Carib Prince* to have been unseaworthy as to the rivet in the bulkhead—a defect which was the initial cause of the loss. But the courts below have apparently failed to appreciate another and more direct cause of the extensive damage that ensued. If the water clearances of such a hold are in order, the damage is confined to the place of the leak, and along its flow to its escape through the limbers at the sides into the bilges, and through the sluices to the pumps. But here the limber boards were quite useless, and shut off the water from its proper

exit, and so held it back in an increasing volume until it had risen four feet, and had saturated cargo to that level throughout this compartment. This is undisputed. The extent and height of the damage confirm the frank acknowledgment of the master of this fault in his limber boards. It is admitted that the point was duly urged below (appellant's brief, 1897, p. 6).

Such defects are vital, and render the vessel liable even where the original leak is from sea perils.

The *Centennial*, 7 F. R., 601.
The *Samuel E. Spring*, 29 F. R., 397.
The *Charles J. Willard*, 38 F. R., 759.
Rondeau *v.* Bergwitz, Appendix, p. .

Yet the opinions of the courts below have ignored this defect, so striking, obvious and indefensible, that it would tax the skill of counsel to argue that it could be deemed *latent.*

The obligation of the shipowner to respond for this cargo damage on a vessel engaged as a common carrier, would ordinarily seem clear. The contention, sustained below, is that by valid subsisting agreements between the shipowner and libellant this right to damages has been contracted away.

### THE EFFECT OF THE CHARTER-PARTY.

The libel is *in rem* and in art. 2 (*Record* p. 2) alleges the shipment on the *Carib Prince* "as a common carrier," at a time and place mentioned :

"And the agents of said steamship signed bills of lading therefor dated the 31st of August, 1893, whereby they acknowledged the receipt of said 500 cases in good order, and well conditioned and undertook to deliver the same at the port of New York, in like good order."

Mr. James Knott, the owner and claimant of the ship, met this allegation by his denial :

SECOND.—He has no knowledge of the matters alleged in the second article of the libel and requires proof thereof, if, and in so far, as they are material." (*Record*, p. 4.)

In a further part of the answer he set up the exceptions of

this bill of lading and alleged "that the owner and *charterer* of said vessel used all due diligence to have her properly equipped, manned, provisioned and outfitted, and in every way seaworthy" and pleaded latent defects, also fault or error in management or navigation of the vessel. (*Record*, p. 5).

The charter party was thus brought into the case by this averment of the owners and *charterer's* diligence, in the answer itself.

While the averment of the answer was carefully drawn to cover the condition of section 3d of the Harter Act, it is to be noted that Congress there requires the due diligence to be exercised by the *owner*. This duty cannot be delegated to a charterer, though if such care have been first taken by the owner, then the *charterer* and the vessel itself, may be relieved from certain specified liabilities.

The owner, invoking the diligence of a *charterer* to supplement his own diligence, naturally must produce his charter party to show the mutual duties in respect to the equipment, maintenance, and seaworthiness of the vessel. The charter party introduced by the claimant (professedly only to prove the owner's relation to the crew), does also show a warranty by Mr. Knott, the shipowner and claimant (fol. 438) and an undertaking to maintain the vessel in a thoroughly efficient state (fol. 440).

The relation of Mr. Knott, the owner, to the master is raised by the claimant. In a suit *in rem* for cargo damage, the private agreements between shipowner and the charterer are not ordinarily material. The cargo looks to the vessel, which is bound by the acts of its officers lawfully in charge. Their log books, written on the voyage, are records available to prove neglect in the bailment. The cargo rights in a suit *in rem* are not dependent in the least on the point whether Mr. Knott appointed the officers. Mr. Knott was not sued, but only the vessel,

When, however, the shipowner comes into the litigation and sets up the charter party, which is also the instrument giving his agents authority to sign bills of lading, he shows by this very document his duties in maintaining the ship in a fit condition. Having proved them, he cannot now deny that they form part of libellant's chain of title.

While the holders of this bill of lading may not be strictly in privity with all the terms and obligations of the charter party, its duties have incontestably become the standard of due diligence to be exercised by Mr. Knott, the owner. He has himself expressly undertaken to do the very things that were incumbent on him as a vessel owner.

THE ARGUMENTS THAT THE DEFECTS IN THE CARIB PRINCE WERE TRIFLING.

The contention by the advocate for the appellee as to the rivet holes was two-fold (1) that the Courts below have not found that these holes were untrue so as materially to affect the strength of the rivet (brief, 1897, p. 14); (2) that such holes into a water tank are trifling and do not rise to the dignity of real unseaworthiness (brief, 1897, pp. 18, 19).

Both of these ingenious attempts to minimize the cause of all this damage are met by one quotation from the opinion of Judge Shipman, in the Circuit Court of Appeals, who found

"that it was a latent and undiscovered defect in the hull of the vessel at the commencement of the voyage from Trinidad; *that consequently the vessel was not, at said time, seaworthy, and that the injury occurred solely through this unseaworthiness*, and not by reason of filling the tank injudiciously." (*Record*, p. 212.)

Water ballast tanks are comparatively recent. By this device, the draft, trim and stability of the ship are quickly adjusted. The water is not merely carried *horizontally* between the double bottoms, where its presence *below* the cargo is less dangerous. For greater facility to balance other loads, this weight and pressure of sea-water is pumped into receptacles, between *perpendicular* bulkheads, rising high above the levels of dry cargo in adjoining holds. These tanks, thus designed solely for the economy and convenience of the shipowner, should be amply protected. Weakness or defects, however slight, may yield to the hydrostatic pressure intensified by violent surges of these masses of water, as the ship rolls and plunges in a seaway.

Mr. Martell, a distinguished authority, stated before the British Institution of Naval Architects in 1883:

"In merchant ships, where the tanks are fitted, we have to be exceedingly careful to see that they are strengthened up in a proper manner. *In the early tanks that were fitted, where the bulkheads had merely angle irons to stiffen them, and there were angle iron beams at the top of the tank, it was found from experience that those tanks were perfectly incapable of withstanding the concussions of water where there was a little leakage* and care was not taken to fill the tank up. Sometimes there is a danger in that, occurring where the ship is trimmed by the stern, and the tank is run up; unless you fill it from the top, there is a difficulty in getting it brim full, and where these large masses of water are moved about in this way, it is an element of exceeding danger. There is consequently great necessity, where tanks are fitted for the purpose of carrying water ballast in that way, to exercise the greatest care to see that they are completely filled and kept filled. We have in all these cases required that there should be a partition bulkhead at the middle line to prevent the danger that would arise from the wash of the water from one side of the tank to the other."

Transactions Inst. of Naval Architects, Vol. XXIV., p. 185.

All water pipes, tubes and valves leading near dry cargo require extreme care. How much less are the possibilities of damage from a water pipe than from this fore peak tank with its volume undivided by a fore and aft bulkhead—its after support a long cross bulkhead held by badly riveted ties and straps.

Some instances of damage from internal pipes and tanks are:

Cap of bilge pump defective,

The *Edwin I. Morrison*, 153 U. S., 199.

Water-closet pipe not cased properly,

Gilroy *v.* Price [1893] App. Cas., 56.

Water-pipe leading to ballast tank broken,

The *Glenmavis*, 69 F. R., 472.

Water-tank leaking,

The *Castleventry*, German Court, 69 F. R., 475, note.

On further hearing of the case, the Imperial Court, on appeal, held the vessel liable for fault in filling the tank with a manhole open.

Hanseatische Gerichtszeitung, 1895, p. 85.
Appendix, pp. 68–85.

Not closing feed cock of ballast tank,

Colignon *v.* Smit (the *Pieter de Coninck*) Jurisprudence d'Anvers, 1892, p. 315.

Leaking tank,

Rondeau *v.* Bergwitz, Appendix, p. 44.

Feed pipe of tank broken,

Apenrader Co. *v.* Steamship Co., Appendix, p. 86.

Discharge pipe of condenser not closed,

*The Versailles*, Appendix, p. 20.

Defective rivet hole in tank,

The *Bergenseren*, 36 F. R., 600.

Stanchion bolt in top of ballast tank giving way,

The *Exe*, 57 F. R., 399.

These illustrate the dangers and damages which experience has shown may come from water pipes and the accumulations of that element in tanks.

If the shipowner thus chooses to admit the sea within the hull of his ship, to save the expense of the old and slow methods of carrying stone or earth ballast—which, being dry, was not harmful to his cargoes—certainly he must take precautions commensurate with the risk he thereby assumes. The cargo is generally well protected from small leaks through the skin of the ship. Dunnage, water clearances to the pumps, and cargo floors, ordinarily serve to remove such water without allowing it to reach the goods.

If the shipowner carries eighty-three tons of water alongside and above dry cargo, which is protected by no dunnage against the tank, nor adequate water clearances beneath, can he afterwards urge that holes letting this water through to the cargo are but trifling, and that his ship was fit and legally seaworthy in spite of these apertures in the tank bulkhead?

The tank in question is in a part of the ship requiring exceptional structural strength. The very side which leaked is the collision bulkhead. It is intended to serve as a barrier and protection against the sea in case of damage or destruction to the stem and bow plates. Vice of construction here is never trifling. On this bulkhead the ship's very life may depend.

Where the bulkhead of a forepeak tank was improperly opened by raising a sluice, the Tribunal at Havre condemned the shipowner for the resulting cargo damage. The Court described the protection which the collision bulkhead is designed to give, the decree saying:

"That it appears from the foregoing that at first the water introduced itself into the forepeak only, that is to say, into a water-tight compartment, *arranged exactly to serve as a stopper (tampon) in case of collision, and capable of being invaded by water, without the safety of a ship, normally* laden, being thereby compromised."

The ship *Timor*, Revue Int. du Droit Maritime, Vol. X., p. 591.

THE DUTY TO TRY THE TANK BEFORE THIS VOYAGE BEGAN.

After the terrific hurricane, which the vessel had encountered on her outward voyage, a special examination of this bulkhead became necessary. In appellee's 1897 brief, p. 15, it is said that

"this storm affords libellant a text for preaching a sermon upon the duty of minute examination of the rivets of the vessel, and the application of the hammer test to each rivet, in every case after a steel steamer has passed through a storm."

This is not appellant's position.

Suppose a cooper have a cask which by strain or damage he thinks may be in danger of leaking, shall he beat a tattoo at every hoop to see that they are in place, and call such a performance a test that the staves are water tight? On the contrary, the doubt is settled by the simple expedient of filling the cask with water.

This water test was not used. It is the natural and prescribed means of trial and proof of such a tank, when originally constructed. After a hurricane surely the same quick and sure test should be resorted to, with the empty ship in port,

before the tank has a chance to leak into dry cargoes. The failure to make this water test is the charge of appellant (Brief 1897, p. 14). As the Court of Paris say, such neglect to have bulkheads made perfectly water tight after a storm—

"Can only be charged to the company which, *forewarned by the log-book, that the passage from Colon to Marseilles had been a bad one*, should, before letting out their ship, have had all parts of her examined, and had necessary repairs done before proceeding to load her" (Appendix, pp. 26, 27).

THE LAW APPLICABLE TO BALLAST TANKS IN SHIPS HAVING DRY CARGO.

The obligation resting on a cooper to have tight casks is primarily in order to save the loss of the liquids. His duty was a strict one, even considering merely the contents of the barrel. If a cooper made a barrel for such purpose, he was bound not only to have his own work free from fault, but even to know that the wood he used was without defect.

Thus Pothier says, a cooper is liable if the casks he makes are of bad wood, and he cannot be allowed to say he was ignorant of this vice, "car sa profession l'obligeoit à connoître la qualité du bois qu'il employoit."*

Traité du contrat de Louage, § 119 (Paris, 1778).

This was not only the rule where the liability was enforced against the *maker*. He who hired out a wine jar (*dolium*) which had a defect so that it leaked, was liable for such defect, whether he knew it or not. Thus Ulpian:

"Si quis dolia vitiosa ignorans locaverit, deinde vinum effluxerit, tenebitur in id quod interest, *nec ignorantia ejus erit excusata*."

Dig. lib. XIX., title II., 19, § 1.

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* In another treatise, Pothier applies this identical principle to a ship, saying:

"Le maître est garant des vices de son vaisseau * * * Il en est tenu, quand même il allégueroit avoir ignoré le vice; car sa profession l'oblige à s'y connoître & à s'en informer. Tout ceci est conforme aux principes que nous avons établis dans notre Traité du contrat de louage, part 2, chap. 1, sect. 4, sur la garantie des vices de la chose louée que en empêcherent l'usage."

*Supplément au Traité du Louage, ou Traité des contrats Maritimes*, vol. 1, pp. 28, 29 (ed. Paris 1774).

The same rule must apply to a ballast tank. It is always under the shipowner's control. A leak from it is certain to do damage. Proper dunnage and good limbers may reduce its extent, but the danger is nevertheless constant. By taking such receptacles into the structure of the ship, the shipowner has also imported into his duties the salutary rule of the ancient law that the hirer out of such casks and jars cannot plead ignorance.

Therefore, in 1891, the Hanseatic Court of Hamburg declared a special rule for such internal tanks and pipes. The shipowner is to attend to it, "that all those arrangements, which serve to convey water thorough the cargo space, are in an *absolutely* seaworthy condition." Appendix, p 93.

The danger and corresponding duty of the shipowner require nothing short of the absolute warranty of tightness at the beginning of the voyage—compliance with which is readily established by merely filling the tank before loading.

### THE DAY WHEN THE LEAK WAS DISCOVERED.

The learned advocate for the appellee at the very conclusion of his brief says :

"It was found in both Courts that the leak was discovered *on the next morning*, after the tank was filled" (brief, 1897, p. 52).

This is not exact. The opinion of Judge Shipman is :

"And the next morning, *or the morning after*, the tank was found partially empty" (*Record*, p. 212).

On such an issue the log books must decide.

Chief Officers log, *Record*, p. 161.
Chief Engineer's log, " pp. 162, 164.

The master confirms this entry, that the tank was filled on the 3d, and the leak found on the 5th.

Legge, *Record*, p. 27, fol. 80.

This interval, covering all day of September fourth, proves not only the neglect of the ship's officers in their care of the cargo, in not observing its damage, but it shows that the effect

of the first injury must have been enhanced by the slow and increasing accumulation of water through the stoppage of the limber boards.

### THE DISTINCT CAUSES OF DAMAGE.

The causes of the libellant's damage are:

1. The vice of construction with a defective rivet.
2. The failure to test the ship's tank after the most terrific hurricane in Captain Legge's long West India experience.
3. The failure to have the limber boards in proper condition to perform their function as water clearances.
4. Proceeding to sea in a trim contemplating the use of the tank.

   All of which appertain to the shipowner himself.
5. Filling the tank without having been properly tested.
6. Not sounding the cargo hold, nor examining the tank itself for an interval of 32 hours after the tank had been so filled.

   Which last neglects are claimed to have been only faults of the shipowner's servants.

### EXCEPTIONS INSERTED IN BILLS OF LADING CONSTRUED AGAINST THE SHIPOWNER.

Without repeating the arguments already submitted that this cause of damage was in no sense a latent defect, I desire to call the attention of this Court to the fundamental rule of construction of such exceptions in a bill of lading, to which the learned Courts below have not conformed.

This rule is thus formulated:

"Exceptions in a bill of lading or charter-party inserted by the shipowner for his own benefit are unquestionably to be construed most strongly against him."

Compania la Flecha *v.* Brauer, 168 U. S., 104, 118, and authorities cited.

Such exemptions are to be taken "*dans le sens le plus strict,*" "*le plus étroit*"—being in derogation of common law rights.

Revue internationale du droit maritime, Vol. III., p. 140; Vol. X., p. 207.

The mere phrase "latent defects" can be construed in obedience to this rule. Such a construction, restricted to the occurrences on the voyage, would not annul the owner's primary obligation of seaworthiness. The suggestion that latent defects are so indefinite in their origin that *ex necessitate* the term must go backward and exempt the shipowner for a vice in construction of the vessel seems contrary to all canons of interpretation of these contracts.

The argument in the Court below on this point is submitted to be inconclusive.

Because a defect at one time may be undiscoverable, it does not follow that after it is manifested by the resulting damage on the voyage, its *origin* would be still unknown, so that it must be presumed to have existed at the time of shipment. On the contrary, broken shafts generally disclose in the fracture clear indications whether the defect has been a congenital one, or has developed by recent strain or molecular change in the metal. The same would be true of a crack or decay in a mast. Hidden defects, therefore, may begin and develop *after* shipment as well as before shipment. An exception of defects after shipment may be effective. The inclusion of all other hidden defects that may have existed since the vessel was launched, cannot therefore be presumed merely from the term latent defects.

There is another reason why the shipper should not be presumed to have accepted and agreed to the term latent defects in the exceptions of his bill of lading, if it has the extended meaning now claimed.

The warranty of fitness of a carrying vessel, like the warranty of title in a sale of chattels,* is taken for granted. It is

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* "It is like the warranty of title, never necessarily embraced in terms in the contract of sale of goods, or on the warranty of their soundness, goodness or other qualities. As well might a man, who was selling property, not his own, reserve the right to cheat the vendee in such sale, as for a carrier to reserve the right to keep his road unsafe, or to send his passenger by an unsafe conveyance."—E. Darwin Smith, *J.*, in Perkins *v.* New York Central Railroad Co., 24 N. Y., 217.

not even a subject of question to an ordinary shipper. By putting the vessel on the loading berth, and soliciting the goods of the public for transportation, the carrier holds out his ship as seaworthy. After goods are entrusted to him on the faith of this implied fitness of his ship, his duty is to receipt for them, stating the exceptions which may excuse non-delivery. While he may enumerate all sorts of perils in the future, he is estopped to go back and deny his own representation of the fitness of his ship. Certainly there is no moral right to attempt this by a *latent exception* buried in a mass of clauses relating to future perils and occurrences of the voyage.

See remarks of Lush, J., in Crooks *v.* Allan, 5 Q. B. D., 40.

The rule that such exceptions are construed prospectively, and never to cut off the owner's primary fundamental duty, accords with the spirit of commercial dealing, as well as with accepted principles of the interpretation of carrier's contracts.

Tattersall *v.* National S. S. Co., L. R. 12 Q. B. D., 297.

THE DIFFERENCE BETWEEN THE DUTIES OF SHIPOWNERS, AS SUCH, AND THEIR LIABILITY FOR ACTS OF THEIR SERVANTS.

The distinction is controlling between the primary and direct obligation of the shipowner for the fitness of the vessel, and his responsibility for the acts of his master and crew in their relation as servants removed from the supervision of the owner's land agents.

This distinction goes to the root of the whole question of the right to contract against negligence. Although now obscured in recent English decisions, it is still recognized on the Continent, and forms the dividing line between exemptions from liability that are regarded as reasonable and therefore valid, and those which are forbidden as against public order. This is so well recognized in France that the ordinary sweeping clauses of a bill of lading are deemed to be ever impliedly checked and circumscribed by this basic obligation of the shipowner to have and maintain his ship in a fit state.

Accordingly the Antwerp Congress of 1885, in discussing

this duty of seaworthiness, had no call to demand that the owners should be prohibited against contracting against their *own* acts, as to seaworthiness, since such stipulations were already held void by an established principle of continental jurisprudence.

But even the remote and consequential liability for the acts of the shipowner's servants in special departments of the ship often impairs the fitness of the vessel. Being near the dividing line, they were therefore prohibited. The shipowners were not to relieve themselves by any contractual exemption "for any acts of their captains or officers tending to compromise the *perfect condition* of seaworthiness of the ships."

No one appeared bold enough, then, to claim that the owner's own acts should be excepted in the bill of lading. The suggestion of the advocate for the appellee that by this provision the owner's right is left unaffected to contract for immunity for his own acts (1897 brief, p. 40) is a misapprehension.

In illustration of the distinction between the scope of negligence clauses in general, and such exemptions when applied to the fitness of the ship itself, certain foreign authorities with translation are inserted *in extenso* in the appendix to this brief. In every case of unfitness of the vessel, however slight, the owner is shown to be deprived of the protection of general exceptions in the bill of lading.

Thus the ship *Versailles* of the Compagnie Générale Transatlantique arrived at Marseilles from Colon having strained her bulkheads in a storm. Workmen from shore left the discharge pipe of the condenser open—a small obstruction having prevented complete closing of the valve (pp. 22, 23). The vessel gradually settled as she took in coal, the discharge pipe was thus submerged, water entered, flowed through the defective bulkheads, and damaged a cargo of sugar and coffee.

The Court of Paris held the owner liable as responsible for the acts of the master in port, as well as for neglects by the shore mechanics (Appendix, pp. 28, 29), and therefore refused to allow the bill of lading exemptions to be interposed, rightly calling them "*exorbitante du droit commun.*"

The Court of Cassation was still more rigorous. In the assessment of damages against the same vessel, the defense pleaded the customary and not unreasonable exemption limit-

ing damages to the invoice value at the port of loading. The Court held this could not restrict the damages due for the fault of the owner respecting his obligation to have a fit ship, and hence that such damages must be paid in full. (Appendix, pp. 30, 33.)

Even so small a matter as a needed lock on an iron sluice, leading into the fireroom could not in France be put off upon the captain and engineers. This failure in the proper equipment was held a default chargeable personally to the owner. Hence he was entirely precluded from invoking for his benefit the clauses of the bill of lading and charter-party. (Appendix, pp. 36, 37.)

Similar doctrine obtains in this country.

Wheeler on Carriers, p. 77.

Both in Belgium and Germany the highest courts hold that the shipowner cannnot excuse himself because his vessel has a class at Lloyds (App., pp. 47, 67). Such a certificate avails nothing against the fact of a leaky tank which saturates cargo by means of defective limbers (App., pp. 44–49). Even water entering by sea peril, but not kept down by the pumps, which stop on arrival in port, is held in Belgium not protected by a negligence clause (App., pp. 50–55). And the Brussels court also holds that it is a personal fault of the owner, against which his bill of lading cannot avail, not to prohibit the master from loading cargo in a hold unfit to receive it by reason of its nearness to the fireroom (App., pp. 56, 59).

The German decisions are equally strict, especially as to tanks and their pipe connections (App., pp. 68, 86). The owner's duty with reference to defects in such pipes, is to remove outer coverings, even sockets and casings, to make certain that the pipe is water-tight, if it lead through a cargo compartment.

Apenrader Co. *v.* German S. S. Co. (App., p. 86).

### WHAT ARE LATENT DEFECTS IN A CARRYING VESSEL.

If, by proper evidence of assent, the absolute warranty of seaworthiness is modified, what is the new liability of the shipowner thus assumed toward cargo? "Latent defects" is a

technical expression in constant use. The carrier of *goods* warrants his vehicle to be in fact seaworthy, or landworthy, as the case may be. The carrier who is not held so strictly is the carrier of *passengers*. He is excused from liability for latent defects. When, therefore, the carrier of cargo talks of latent defects, he seeks to put his liability for the condition of his ship on the footing of a carrier of passengers. Instead of absolutely warranting its perfect condition of seaworthiness, he asks to be allowed to stand relieved from latent defects, like a passenger carrier.

The term "latent defects" therefore would have the same construction in such a contract for carriage of goods, that it already has received by a long course of judicial decision with passenger carriers.

The rule as to such defects is well settled.

They are not merely concealed, hidden blemishes or unseen imperfections. They must be such as are undiscoverable by any practicable mode of examination. As applied to a vehicle used by a common carrier a latent defect is limited to that which could not be detected or avoided by any means which science has furnished. Bad workmanship cannot be so covered up as to amount to a latent defect to excuse a common carrier.

In an early case in England, the defense of latent defect in the construction of a stage coach was rejected. The Court said:

"The injury in the present case appears to have been occasioned by an original defect in construction; and if the defendant were not responsible, a coach proprietor might buy ill-constructed or unsafe vehicles, and his passengers be without remedy."

Sharp *v.* Gray, 9 Bing., 457.

In a Massachusetts case, such a defect was received as a defense to a passenger carrier, if it were clearly shown to have been impossible of detection.

"That if an accident happens from a defect in a coach, which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason

of such accident. On the other hand, where the accident arises from a hidden and internal defect *which a careful and thorough examination would not disclose, and could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then* the proprietor is not liable for the injury."

Ingalls *v.* Bills, 9 Metc., 15.

In Readhead *v.* Midland R. R. Co.,4 Q. B., 379, the carrier was held not responsible for a latent defect which *neither he nor those who made the carriage* could by proper care have prevented or detected.

In Francis *v.* Cockrell, L. R. 5 Q. B., 184, the requirement was:—"all the examination which human skill and foresight could make."

In the later case of Hyman *v.* Nye, 6 Q. B. D., 685, 687, the accident to excuse the carrier must *not be "preventable by any care and skill."*

In a leading New York case, Judge Selden reasoned on the improbability of such a defect being shown.

"Nothing can exempt him from this responsibility but the existence of some latent defect, which no reasonable degree of human skill and foresight could guard against, and this obligation extends to every species of appliance belonging to the carrier and used by him in the business in which he is engaged. Consequently whenever it appears that the accident occurred through some defect in the vehicle or other apparatus used by the carrier, a strong presumption of negligence arises founded upon the improbability of the existence of any defect which extreme vigilance aided by science and skill could not have detected."

Curtis *v.* Rochester & Syracuse R. R. Co., 18 N. Y., 534, 586.

Of a river steamboat the New York Court of Appeals said:

"If a defect existed which could not have been avoided or remedied *by any means which science had furnished or disclosed*, the defendant should have employed such means, though not generally used."

Caldwell *v.* New Jersey Steamboat Co., 47 N. Y., 289.

In a leading Massachusetts case, Mr. Justice Gray, then Chief Justice of the Supreme Court of that Commonwealth, said:

"The corporation was doubtless obliged to use the utmost care consistent with the nature and extent of its business, in providing a proper switch, but it was not responsible for hidden defects which could not have been discovered by the *most* careful inspection."

Ladd *v.* New Bedford R. R. Co., 119 Mass., 412.

A late statement of the rule in New York is:

"This duty is not discharged without the utmost care and diligence which human prudence and foresight will suggest to secure the safety of its passengers. And this vigilance is to be exercised by the company to see that its road and appliances used in operating it are and remain in good condition and free from defects; and a latent defect which will relieve it from responsibility, is such only as no reasonable degree of human skill and foresight could guard against."

Palmer *v.* The Delaware & Hudson R. R. Co., 120 N. Y., 170.
See also Robinson *v.* N. Y. Central R. R., 20 Blatch., 338.
Bevan on Negligence, Vol. 2, 1150–1154 (2d ed.).
Thomas on Negligence, p. 227.

A late author states the rule as follows:

"Both in America and England, the decided weight of decision holds the carrier liable for the negligence of the manufacturer, where the passengers' safety is thereby imperiled."

Ray, Negligence, Imposed Duties, Carriers of Passengers, p. 57 (Ed. 1893).

THE APPLICATION OF THESE PRINCIPLES TO THE CARIB PRINCE.

Applying these principles to the case at bar, it seems clear—

(*a.*) That the term latent defect, as employed in the bill of lading, must be reconciled with the owner's obligation and warranty of seaworthiness.

(*b.*) A latent defect is not a vice of construction, even if it be afterwards concealed during the process of construction.

(*c.*) A latent defect may be defined as one which from its nature is not discoverable by any of the practicable modes of examination of the object in question. If it is, or has been, capable of discovery, by such examination, then it is not latent.

Neither is it latent, merely because it is not obvious, or because it may be overlooked without negligence.

(*d.*) The defect in the condition of the bulkhead with leaky rivets cannot be termed latent, within the bill of lading, merely because the defect was not found at the prior water test at the time of building.

(*e.*) The time to try the bulkhead by a proper test was when the vessel had passed through the terrific hurricane—and no such test was then made.

(*f.*) The burden of bringing the damage within exceptions of the bill of lading, is on the claimant.

(*g.*) There were not the elements of a latent defect in the vice of original construction, the weakness and leak developed by the hurricane, the bad trim of the ship, or the closed limber boards.

(*h.*) The damage, therefore, does not fall within any valid ground of exception. The vessel is liable for her defective condition.

HARRINGTON PUTNAM
Advocate

Dated February 1898

## Appendix.

French authorities..... pp. 20–43

Belgian " ..... " 44–59

German " ..... " 60–95

FRENCH AUTHORITIES ON CLAUSES OF BILLS OF LADING PURPORTING TO RELIEVE SHIPOWNERS FROM LIABILITY FOR THEIR OWN ACTS.

"743. Les clauses des connaissements vont souvent plus loin que les précédentes ; elles tendent à exclure la responsabilité elle-même. On peut distinguer : 1° celles qui stipulent la non-responsabilité du propriétaire du navire à raison des fautes du capitaine ou des gens de l'équipage ; 2° celles qui stipulent la non-responsabilité, soit du propriétaire, soit du capitaine à raison de ses propres fautes. La validité même de ces clauses est contestée. Aussi est-il indispensable d'examiner si les clauses de la première ou de la seconde espèce sont valables. Il est facile d'apercevoir que les secondes ont un caractère plus exorbitant que les premières, par cela même que les secondes ont pour but d'exclure pour une personne la responsabilité de ses propres fautes, tandis que les premières tendent à empêcher une personne (l'armateur) d'être responsable des fautes de ses préposés (capitaine et gens de l'équipage). La jurisprudence française admet la validité des clauses de la première sorte qui sont, du reste, de beaucoup les plus fréquentes, et prononce la nullité de celles de la seconde."

Traité de Droit Maritime, par Lyon-Caen et Renault, vol. 1, p. 504 (Paris, 1894).

"Nous croyons donc que tous les arrêts rendus concordent parfaitement. La clause d'exonération ne vaut jamais que pour renverser le fardeau de la preuve, lorsqu'elle s'applique aux fautes personnelles ou à celles des préposés terrestres. Elle est pleinement efficace, en tant qu'elle écarte la responsabilité de l'armateur pour les fautes du capitaine ou des gens de l'équipage, comme nous aurons à le démontrer.

C'est ainsi que le Tribunal civil de Tunis jugeait, le 29 déc. 1893, que l'armateur ne pouvait s'exonérer de la responsabilité des fautes commises par son agent au port de débarquement."

Boutard, Des Clauses de Non-responsabilité, p. 273 (Paris, 1896).

Bills of lading clauses often go further than the foregoing.* They tend to exclude liability itself. One may distinguish: first, those which stipulate for the shipowner's non-liability for faults of the master or crew; second, those which stipulate for non-liability either of the owner, or of the master, for his own faults. The validity even of these clauses is disputed. It is therefore essential to examine whether the clauses of the first or second class are valid. It is readily perceived that the second are of a more exorbitant character than the first, because the second aim to discharge a person from liability for his own faults; whereas the first tend to prevent a person (shipowner) from being liable for the faults of his agents (master and crew). French jurisprudence recognizes the validity of clauses of the first kind, which are also much more frequent, and decrees the nullity of those of the second.

We believe that all these decided cases are in perfect accord. The clause of exoneration can never go further than shift the burden of proof, when it is applied to personal faults, or to those of the land agents. It is fully effective in so far as it discharges the liability of the owner for the faults of the master or the crew, as we shall proceed to show.

This is also what the Civil Tribunal of Tunis decided the 29th of December, 1893, that the owner cannot free himself from liability for faults committed by his agents at the port of unloading.

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*In the preceding sections, the authors had discussed the clauses "weight unknown," etc., also the provisions limiting the amount of damages recoverable.

## COUR DE CASSATION.—CHAMBRE DES REQUETES.

(18 février 1889.)

ARRÊT

LA COUR,

Sur le moyen unique tiré de la fausse application des articles 221, 222, 229 C. com., de la violation des articles 1134, 1142, 1146 et 1382 C. civ., 1315 et suivants du même code, des règles de la preuve et de l'article 7 de la loi du 20 avril 1810 :

Attendu qu'il résulte des constatations de l'arrêt attaqué que l'avarie d'une partie du maïs transporté par le navire *le Cid* ne peut être attribuée à un vice propre de la marchandise ; que cette avarie est le résultat des appareils à vapeur tels qu'ils ont été installés à bord par le fait des armateurs ;

Qu'il ressort avec évidence des constatations des experts que les installations dudit navire étaient imparfaites et vicieuses dans les parties avoisinant les marchandises, en tant que ces parties étaient destinées à recevoir des maïs sur le navire affrêté pour transporter un plein et complet chargement de cette marchandise ;—Que, par suite, l'arrêt déclare que les armateurs ont commis une faute, laquelle a consisté à louer aux chargeurs un instrument de navigation insuffisamment aménagé pour remplir l'objet du contrat ;—Que l'arrêt dispose, en outre, que le capitaine n'a commis aucune faute soit comme arrimeur, soit comme navigateur ;

*Attendu qu'en se plaçant au point de vue de la faute personnelle des armateurs, et appréciant souverainement la clause d'exonération du connaissement, l'arrêt déclare que cette clause, invoquée par les armateurs, excepte taxativement les dommages dus à une absence de contrôle de ceux-ci ; que les fautes dont l'armateur s'est exonéré sont celles qui, d'après ladite clause, ne résultent pas d'un manque de soin et de diligence de la part des propriétaires du navire.*

Qu'en confirmant, dans ces circonstances, les jugements des 21 juin et 19 juillet 1886, l'arrêt attaqué, dont les motifs expliquent et justifient suffisamment la décision, n'a violé ni faussement appliqué aucun des textes invoqués,

Rejette.

Du 18 février 1889. Ch. req. MM. Bédarrides, pr.; Rivière, rap.; Petiton, av. gén., c. conf.; André Morillot, av.

(*Revue internationale du Droit maritime*, t. IV., p. 629.)

## COURT OF CASSATION—CHAMBER OF REQUESTS.*

February 18th, 1889.

DECREE.

THE COURT:

Upon the only argument drawn from a false application of articles 221, 222, 229, of the Commercial Code, regarding the violation of articles 1134, 1142, 1146 and 1382 of the Civil Code; 1315 and following of the same code, of the rules of proof and of article 7 of the law of April 20th, 1810;

Whereas, it results from the findings of the decree attacked, that the damage to a lot of corn carried by the vessel, the *Cid*, cannot be attributed to vice of the goods; that this damage is the result of steam equipment as put into the vessel by the owners; that evidence drawn from the verifications of experts shows that the equipment of said vessel was imperfect and vicious in the parts of same which were near the cargo, inasmuch as these parts were intended to receive corn in a vessel chartered to carry a full and complete cargo of that merchandise; that, in consequence, the decree declares that the owners have committed a fault, which consists in hiring out to shippers an instrument of navigation insufficiently equipped for fulfilling the object of the contract. That, the decree finds besides that the master has committed no fault, either as stevedore or as navigator;

Whereas, regarding the owners' personal fault, the decree below, being final in its appreciation of the exonerating clause of the bill of lading, declares that that clause, set up by the owners, excepts definitely damage due to an absence of control upon their part; that faults from which the owner is exonerated are those which, according to said clause, do not result from want of care and diligence upon the part of the owners of the vessel. That, while confirming, in these circumstances, the sentences of June 21st and July 19th, 1886, the decree attacked—the reasons for which sufficiently explain and justify the decision—has neither violated nor falsely applied any of the texts invoked,

Rejected.

February 18th, 1889. Chamber of Requests, Messrs. Bédarrides, President. Rivière, Reporter. Petiton, Advocate General, concurring. André Morillot, Counsel.

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* The Court of Cassation usually sits in three chambers, 1, *la chambre des requêtes* (which examines civil appeals to see if they are justifiable) 2, *la chambre civile*, which finally hear such civil appeals as the above allow, and 3, *la chambre criminelle*, which hears certain criminal appeals.

## COUR DE CASSATION.—CHAMBRE CIVILE.

(16 janvier 1895.)

I.—*L'emploi d'une machine incapable par son mode de construction d'obéir, dans un délai normal et dans toutes ses positions, au commandement, constitue une faute personnelle à l'armateur, et dont il ne saurait être relevé par la clause d'exonération des barateries du capitaine et de l'équipage.*

II.— ..... ..... .....

### ARRÊT

La Cour,

Sur le moyen unique du pourvoi :

Attendu qu'il est déclaré par l'arrêt attaqué que le naufrage du *Mohamed-el-Sadock* est résulté d'un retard de 30 à 35 secondes dans l'exécution de la manœuvre commandée de faire machine en arrière à toute vitesse ; que ce retard a été dû, non au mécanicien, mais à la machine elle-même, qui, "comme celles à deux cylindres dans lesquels la vapeur n'est introduite directement que par un seul, était sujette à des positions dans lesquelles elle ne pouvait partir ;" qu'il y avait donc vice propre de l'engin et faute caractérisée de la Compagnie d'avoir employé "une machine incapable, par la nature et l'imperfection de son mécanisme, d'obéir, dans un délai normal et dans toutes ses positions, au commandement du capitaine ;" que c'est là une appréciation souveraine ; qu'il est vrai que le pourvoi soutient que l'emploi de la machine en question n'a pu constituer juridiquement une faute, parce que le prétendu vice propre relevé "est une disposition intérieure, qui, dans l'état actuel de la science, est inhérente à toute machine de ce type, si perfectionnée et si bien construite qu'elle puisse être," ainsi que cela résulterait d'un rapport d'expert fait postérieurement à l'arrêt attaqué, dans une autre affaire relative au même naufrage et jugée par la même Cour d'appel ; mais que ce moyen est nouveau ; que la Cour de Montpellier, lors de l'arrêt attaqué, n'a pas été mise en demeure d'examiner et n'a pas pu vérifier l'exactitude du fait qui lui sert de base et que, dans la cause, on ne saurait invoquer une expertise qui y est étrangère ;

Rejette, etc.

(*Revue Internationale du Droit maritime*, t. X., p. 561.)

## COURT OF CASSATION—CIVIL CHAMBER.

January 16th, 1895.

I.—The use of an engine which, by reason of its mode of construction, is incapable of obeying an order in a normal space of time and under all circumstances, constitutes a personal default of the owner, from which he cannot be relieved by the clause exonerating him from barratry of the master and crew.

II.—

### DECREE.

THE COURT :

Upon the only ground for appeal :

Whereas, it is declared in the decree attacked that the wreck of the *Mohamed-el-Sadock* resulted from a delay of from 30 to 35 seconds in the execution of the manœuvre ordered, to "back at full speed"; that this delay was due, not to the engineer, but to the engine itself, which, "like those with two cylinders in which the steam is introduced directly through one only, was subject to positions in which it would not start"; that there was vice in the engine, and undeniable fault upon the part of the company for having used an "engine incapable, through the nature and imperfection of its mechanism, of obeying the orders of the master in a normal space of time and under all circumstances"; that this finding is final; that it is true that the appeal claims that the use of the engine in question could not constitute a legal default, because the pretended vice set up "is an internal arrangement which, in the present state of science, is inherent to every engine of this type, however perfected and well constructed it may be", as would appear from the report of an expert, made subsequent to the decree attacked, in another case relating to the same wreck and tried by the same Court of Appeals; but that this argument is a new one; that the Court of Montpellier, at the time of the decree attacked, was not compelled to examine into, and was not able to verify, the exactness of the fact which serves as its base, and that, in this suit, it would not be allowable to invoke expert testimony foreign to it;

Rejected, &c.

## COUR D'APPEL DE PARIS.

(5 mars 1895.)

I.—*L'armateur est responsable du dommage causé aux marchandises de la cale par le fait d'une introduction d'eau, pendant le chargement, par les tuyaux de décharge, si cette introduction a eu pour cause la non-fermeture des cloisons et des portes étanches, le capitaine ayant l'obligation, lorsque le navire est immergé, de veiller à cette fermeture faute de pouvoir s'assurer si les soupapes des tuyaux, lorsqu'elles sont abaissées, sont ou non closes hermétiquement.*

II.—*La clause du connaissement qui exonère l'armateur des fautes du capitaine n'est pas applicable aux fautes commises au port d'attache par le capitaine agissant sous la direction et le contrôle de l'armateur.*

ARRÊT

La Cour,

Considérant qu'il résulte des faits, circonstances et documents de la cause, ainsi que le reconnaissent expressément les parties elles-mêmes, que dans la nuit du 14 au 15 mars 1892 le steamer *Versailles*, appartenant à la Compagnie Transatlantique, étant alors à l'ancre dans le port de Marseille, s'échoua sur le fond par suite de l'introduction de l'eau dans le navire par le tuyau de décharge ou condenseur resté ouvert, ce qui a causé l'avarie des marchandises appartenant aux appelants qui en demandent réparation ; que pour reconnaître les causes de cet événement et les responsabilités qui en résultent, il est nécessaire de rappeler que le navire, venant de Colon, est arrivé en rade de Marseille le 13 mars 1892 au matin ;

Que ce navire devant repartir le 18, on procéda immédiatement à son déchargement et en même temps à l'embarquement du combustible ;

Que le lundi soir, le navire avait débarqué 450 tonnes de marchandises ; qu'il en restait 550 tonnes dans les cales et que, de plus, son water-ballast contenant 475 tonnes, était complètement rempli ;

Que le travail fut interrompu à l'heure de la cessation du travail, tandis que l'embarquement du charbon continua toute la nuit ;

Que dès le lundi 14 à 9 heures du matin, une équipe

## COURT OF APPEAL OF PARIS.

(March 5th, 1895.)

I.—The owner is responsible for damage caused to goods in the hold, from the entrance of water, during the loading, through the discharge pipes, if this entrance has been caused by the bulkheads and watertight doors not having been closed, the master being under obligation when the ship is immersed, to look after this closing, if he is unable to assure himself whether the valves of pipes, when they are down, are hermetically closed or not.

II.—The clause in the bill of lading which exonerates the owner from defaults of the master, is not applicable to defaults committed at the home port by the master acting under the direction and control of the owner.

DECREE.

THE COURT.

Considering that it results from the facts, circumstances and documents, as the parties themselves expressly recognize, that during the night of the 14th to 15th March, 1892, the steamer *Versailles*, belonging to the Compagnie Transatlantique, being then at anchor in the port of Marseilles, grounded on the bottom through the introduction of water into the ship through the discharge pipe or the condenser left open, which caused damage to goods belonging to appellants who demand reparation ; that, in order to understand the causes of this occurrence and the responsibilities resulting from it, it is necessary to recollect that the ship coming from Colon arrived in the harbor of Marseilles on the morning of March 13th, 1892 ;

That, as this ship was to leave again on the 18th, they immediately proceeded with her discharge, and at the same time the taking on board of fuel ;

That, Monday evening, the ship had discharged 450 tons of merchandise ; that there remained 550 tons in her holds, and that, besides, her water ballast tank containing 475 tons was completely full ;

That the work [discharging] was interrupted at the hour for stopping work, while the taking on board of coal continued all night ;

That, at 9 o'clock in the morning of Monday the 14th, a gang of workmen belonging to the Marseilles agency of the

d'ouvriers appartenant à l'établissement que possède à Marseille la Compagnie Générale Transatlantique fut envoyée par ladite Compagnie, sous la conduite et la direction d'un chef d'équipe spécial, à l'effet de procéder à l'ouverture, à la visite du condenseur et aux réparations d'entretien, le navire ayant fait, suivant les indications consignées sur son livre par le capitaine, une très pénible traversée ;

Que le 14 au soir, cette équipe quittait le travail laissant le condenseur ouvert (p. 2 du rapport) ;

Qu'il résulte des autres constatations de l'expertise que les portes étanches placées entre la machine et la chambre de chaufferie avaient également été laissées ouvertes, ainsi que celles également étanches de la soute à charbon, entre laquelle et le quatrième compartiment n'existe qu'une cloison étanche ;

Qu'il en résulte encore que l'une des soupapes destinées à fermer les tuyaux de décharge du condenseur n'ayant pu, par suite de l'interposition d'un paquet de joncs, s'appliquer exactement sur le seuil où elle devait reposer, une ouverture de 3 centimètres était restée béante et pouvait permettre, en cas d'immersion de ces tuyaux, à l'eau de mer de s'introduire dans le condenseur et au delà, à raison de l'ouverture des portes ci-dessus indiquées dans certaines autres parties du navire ;

Considérant, ceci exposé, qu'il est établi et non dénié que, par suite du chargement du charbon pendant toute la nuit du 14 au 15 mars, le navire s'enfonçant peu à peu dans l'eau, les tuyaux de décharge du condenseur furent immergés et la soupape de l'un d'eux n'étant point, ainsi qu'il a été dit plus haut, hermétiquement fermée, l'eau s'est précipitée dans le condenseur d'où elle s'est répandue par la porte étanche ouverte jusque dans le quatrième compartiment, où se trouve la cale, et a été refoulée jusque dans la cale arrière, où elle n'aurait pu se répandre si les cloisons qui séparent le premier compartiment de la chambre de la machine eussent été, comme elles auraient dû l'être, absolument étanches ou si le tunnel dans lequel l'eau qui s'échappe du condenseur a un libre accès pour se rendre à la mer, eût été lui-même en état d'étanchéité complète ;

Qu'il résulte donc de ce qui précède que la cause initiale de l'accident doit être attribuée à la non-fermeture de la soupape de l'un des tuyaux de décharge ; mais que ce fait, qui au surplus n'a point été la cause immédiate de l'échouement du

Compagnie Générale Transatlantique was sent by that Company under the conduct and direction of a special master workman, for the purpose of opening, examining and making any necessary repairs to the condenser, the ship having had a very hard passage, according to the master's entries in his log;

That in the evening of the 14th the workmen quit work, leaving the condenser open (page 2 of protest);

That it is shown by the other verifications of the survey that, the watertight doors placed between the engine and the fireroom had also been left open, as well as the equally watertight ones of the coal bunker, between which and the fourth compartment there is a watertight bulkhead only;

That, further, it appears that one of the valves destined to close the discharge pipe of the condenser could not come down exactly upon the sill where it ought to rest, on account of a bundle of cane which got interposed, and there remained yawning an opening of 3 centimeters which, in case of the immersion of these pipes, could allow the sea water to get into the condenser and beyond it, because of the opening of the doors above mentioned in certain other parts of the ship;

Considering, this being shown, that it is established and not denied that, through the loading of the coal the whole night of the 14th to 15th March, the ship settling little by little in the water, the discharge pipes of the condenser were immersed, and the valve of one of them, as stated above, not being hermetically closed, the water precipitated itself into the condenser, from whence it spread itself through the open watertight door into the fourth compartment, where the hold is, and was driven away back to the after hold, where it could not have spread itself if the bulkheads which divide the first compartment from the engine room had been absolutely tight, as they should have been, or if the tunnel through which the water which escapes from the condenser finds free escape into the sea had itself been completely watertight;

That it therefore results from that which precedes, that the initial cause of the accident should be attributed to the non-closing of the valve of one of the discharge pipes; but that this fact, which at the most was not the immediate cause of the grounding of the ship, may be considered as a matter of accident, because of the impossibility upon the part of the man

navire, peut être considéré comme un cas fortuit à raison de l'impossibilité où se trouve l'homme d'équipage chargé de l'abaisser de constater si la fermeture du tuyau est ou non complète et absolue ;

Considérant dès lors qu'il n'y a lieu ni en fait ni en droit de retenir ce fait comme ayant été la cause immédiate de l'événement dont s'agit ;

Considérant, en effet, que si, abstraction faite des circonstances ci-dessus énoncées, on suppose l'immersion des tuyaux de décharge du condenseur, l'une des soupapes n'étant pas hermétiquement fermée, l'eau se serait assurément précipitée dans le condenseur, mais elle aurait été confinée sans pouvoir se répandre dans les autres parties du navire, si les portes dont il a été ci-dessus parlé étaient restées fermées, et n'aurait pu ainsi, suivant le dire des experts, occasionner qu'un simple ennui ;

Qu'on ne peut donc rationnellement attribuer la cause immédiate et directe de l'échouement sur fond du navire qu'à la non-fermeture des portes étanches laissées ouvertes par l'équipe des ouvriers envoyés par la Compagnie Générale Transatlantique, et aussi, de toute nécessité, à la non-étanchéité de la cloison séparant la chambre de la machine du premier compartiment où se trouve la cale arrière, et vraisemblablement aussi au mauvais état du tunnel où se meut l'arbre de l'hélice ;

Qu'il y a lieu maintenant de rechercher si, en laissant ces portes ouvertes dans les conditions ci-dessus indiquées, les ouvriers envoyés par la Compagnie n'ont pas commis une faute lourde, de nature à engager directement la responsabilité de la Compagnie, ou si, tout au moins, il ne résultait pas, soit pour le capitaine, soit pour la Société, soit pour les deux simultanément, la nécessité de prendre certaines précautions spéciales et d'exercer une surveillance extraordinaire qui aurait pu incontestablement prévenir l'accident dont se plaignent les parties appelantes ;

Considérant sur ce point et étant admis qu'on ne peut, sur les navires les mieux organisés, se rendre compte quand les soupapes des tuyaux de décharge sont *abaissées*, si elles sont ou non hermétiquement fermées, l'armateur ou ses préposés, le capitaine ou les gens de l'équipage auxquels il commande ont pour premier devoir de prévoyance et de vigilance de supposer toujours, chaque fois qu'ils procèdent au chargement des mar-

entrusted with lowering it of ascertaining whether or not the closing of the pipe was complete and absolute ;

Considering, therefore, that there is no reason, either in fact or in law, to take this fact as having been the immediate cause of the occurrence in question ;

Considering, in fact, that, if leaving out the circumstances here above related, one supposes the immersion of the discharge pipes of the condenser, one of the valves not being hermetically closed, the water would certainly be precipitated into the condenser, but it would have been confined without being able to spread into other parts of the ship, if the doors mentioned above had remained closed, and thus according to the expert would have been able to cause a simple annoyance only ;

That one can only rationally attribute the immediate and direct cause of the grounding of the ship on the bottom to the non-closing of the watertight doors, left open by the gang of workmen sent by the Compagnie Générale Transatlantique, and as well, necessarily, to the bulkhead separating the engine room from the first compartment, where the after hold is, not being watertight, and as truly also to the bad condition of the tunnel in which the shaft turns ;

That there is reason to investigate whether, in leaving these doors open under the conditions above named, the workmen sent by the Company have not committed a grave default, so as to make the Company directly responsible, or whether, at least, there is not shown the necessity, whether upon the part of the master or upon that of the society, or both simultaneously, of taking certain special precautions and of exercising an unusual superintendence which would incontestably have foreseen the accident of which the appellants complain ;

Considering this point, and it being admitted that upon the best organized ships one cannot assure one's self whether or not the valves of the discharge pipes are hermetically closed when they are lowered, the owner or his representatives, the master or the crew which he commands, have as the first duty of foresight and vigilance to always suppose each time that they proceed to load merchandise or fuel, the discharge pipes may be submerged by the very fact of loading, and that they are not hermetically closed ;

That it was the duty of the special gang of workmen sent

chandises ou du combustible, que les tuyaux de décharge peuvent être submergés par le fait même du chargement, et qu'ils ne sont pas hermétiquement fermés.

Que l'équipe d'ouvriers spéciaux envoyée par la Compagnie sous la conduite d'un chef d'équipe pour ouvrir le condenseur et faire les réparations nécessaires, avait donc le devoir, après avoir ouvert les portes étanches ci-dessus indiquées, de les refermer, quelle que fût la durée du travail qui pouvait au surplus être confié à un seul chantier, ou tout au moins de s'assurer, comme l'ont pu faire très facilement les experts au cours de leur visite, si les tuyaux de décharge du condenseur dans lequel ils avaient dû pénétrer, étaient hermétiquement fermés ;

Que n'ayant pas pris cette précaution, alors qu'ils savaient indubitablement que le chargement du charbon devait continuer toute la nuit, ils devaient eux-mêmes, ou les ingénieurs de la Compagnie qui les avaient préposés au travail de réparations, recommander et même organiser une surveillance spéciale pendant toute la nuit, pour éviter l'introduction de l'eau dans le condenseur et par suite dans les autres parties du navire communiquant librement entre elles.

Qu'on peut même ajouter que cette surveillance spéciale faisait également partie des devoirs du capitaine, mais que les deux visites faites à minuit et 2 heures et demie du matin étaient évidemment insuffisantes ;

Qu'au surplus, la communication laissée libre entre le condenseur, la chambre des machines et la soute à charbon n'aurait peut-être pas à elle seule causé l'accident dont il s'agit, si les cloisons étanches qui existent entre la chambre des machines et le premier compartiment eussent été dans un parfait état d'étanchéité, aussi bien que le tunnel traversant ce premier compartiment qui avait été fortement endommagé pendant le voyage de Colon à Marseille, et dont les experts n'ont pu, par le fait de la Compagnie et malgré leurs recommandations de le laisser entièrement dégagé au moment de l'accident, ne saurait être imputée qu'à la Compagnie, qui, prévenue par la lettre du bord que la traversée de Colon à Marseille avait été mauvaise, aurait dû, avant d'armer son navire, faire vérifier toutes les parties du bâtiment et faire opérer les réparations nécessaires avant de faire procéder à son chargement (Art. 2 de la loi du 30 janvier 1891) ;

by the Company under the conduct of a master workman, to open the condenser and make the necessary repairs, after having opened the watertight doors above mentioned, to close them, whatever might have been the length of work which could at the most be confided to one shipyard alone, or at least to assure themselves, as the experts in the course of their visit have been able to do very easily, whether the discharge pipes of the condenser into which they must have penetrated, were hermetically closed ;

That, not having taken this precaution, when they undoubtedly knew that the loading of the coal was to continue all night, they should have themselves, or the engineers of the Company who had entrusted them with the repairs, should have recommended and even organized a special oversight all night, to avoid the introduction of water into the condenser and thence into other parts of the ship communicating freely with each other ;

That it may even be added that this special oversight was equally one of the duties of the master, but that the two visits made at midnight and at 2.30 in the morning were evidently insufficient ;

That, besides, the communication left free between the condenser, the engine room and the coal bunker might not of itself alone have caused the accident in question, if the water tight bulkheads which exist between the engine room and the first compartment had been perfectly water tight, as well as the tunnel passing through this first compartment which had been considerably damaged on the voyage from Colon to Marseilles, and which the experts were not able in spite of their recommendations to have left perfectly free at the time of the accident, through the act of the Company,—can only be charged to the Company, which forewarned by the log book that the passage from Colon to Marseilles had been a bad one, should, before fitting out their ship, have had all parts of her examined, and had necessary repairs done before proceeding to load her.

(Art. 2 of the law of January 30th, 1891.)

Considering that it results from all that which precedes that the grounding of the ship *Versailles* on the bottom, from whence the damage for which appellants demand satisfaction,

Considérant qu'il résulte de tout ce qui précède que l'échouement sur le fond du navire *Versailles*, d'où provient l'avarie dont les appelants demandent réparation, a pour cause directe et immédiate l'incurie, la négligence ou le défaut de vigilance des ouvriers spéciaux chargés par la Compagnie ou les ingénieurs à la tête de son établissement technique de Marseille, de faire certaines réparations techniques à ce navire ;

Qu'en admettant qu'il doive être simultanément attribué et au défaut de surveillance et à la négligence du capitaine, la Compagnie Transatlantique n'en serait pas moins personnellement responsable, d'abord comme y ayant personnellement, par elle ou ses préposés, directement participé, et ensuite *comme responsable des fautes commises par son capitaine au port d'attache du navire*, et agissant sous sa direction et son contrôle, et ne pouvant, dès lors, invoquer la clause d'exonération exorbitante du droit commun, insérée dans l'article 8 du connaissement ;

Que, dans ces conditions, il y a donc lieu de faire droit à l'appel et d'ordonner, la Cour ne trouvant pas dans la cause les éléments d'appréciation du préjudice dont la réparation est demandée, que cette évaluation sera faite après vérification par arbitre rapporteur conformément à la loi.

Par ces motifs :

Emendant, réformant et faisant ce que les premiers juges auraient dû faire,

Déclare la Compagnie Transatlantique responsable des avaries subies par les marchandises des appelants chargées sur le navire *Versailles* appartenant à ladite Compagnie.

Renvoie la cause et les parties devant Gautron, 13, rue Tronchet, que la Cour, à défaut d'entente entre les parties, commet pour l'examen des comptes, pièces et registres, dans les termes de l'article 429 C. pr. c., à l'effet d'indiquer et préciser le montant du dommage subi par les appelants dans l'accident du navire *Versailles* dans la nuit du 14 au 15 mars 1892 pour, sur le rapport de l'arbitre déposé au greffe de la Cour, être conclu et statué à ce qu'il appartiendra ;

Dit qu'en cas d'empêchement, il sera procédé au remplacement de l'arbitre rapporteur par ordonnance de M. le Premier Président, rendue sur simple requête ;

Ordonne la restitution de l'amende.

(*Revue internationale du Droit maritime*, t. XI., p. 154.)

has as its direct and immediate cause the carelessness, the negligence, or the lack of vigilance of the special workmen entrusted by the company or by the engineers at the head of its technical establishment at Marseilles, with making certain technical repairs to that ship;

That,—admitting that it may be simultaneously attributed to both the lack of superintendence and to negligence on the part of the master, the Compagnie Transatlantique would not be the less personally responsible, first, as having personally, itself or through its representatives, directly participated, and again, *as being responsible for the defaults committed by its master at the home port of the ship*, and acting under its direction and control, and not being allowed therefore, to invoke the exorbitant exoneration clause, by common law, inserted in article 8 of the Bill of Lading;

That,—under these conditions, there are grounds for admitting the right to appeal, and ordering that, the Court not finding in the case the elements for estimating the damages for which satisfaction is demanded, the valuation of same be made by proof before referee, according to law.

FOR THESE REASONS;—

Amending, reforming and doing that which the first judges should have done;

Declare;—The Compagnie Transatlantique responsible for the damage suffered by the goods of appellants, laden upon the Ship *Versailles*, belonging to the said Company;

Sends back the case and the parties before Gautron, 13 rue Tronchet, whom the Court appoints to examine the accounts, documents and records, if the parties cannot come to an agreement according to the terms of article 429 Commercial Code, for the purpose of showing and fixing the amount of damage suffered by the appellants in the accident to the Ship *Versailles* during the night of the 14th to 15th March, 1892, that upon the report of the referee deposited in the office of the Clerk of the Court, same may be closed and decreed as may be proper;

Says that, in case of anything preventing, the referee shall be replaced by an order of the First President, given upon simple request;

Orders the restitution of the sum deposited.

## COUR DE CASSATION.—CHAMBRE DES REQUETES.

(3 mars 1897.)

Connaissement. Clause limitant la responsabilité. Avaries de route. Application. Fait personnel de l'armateur. Inapplication. Art. 1382 C. civ.

NAVIRE : *Versailles.*

*Les clauses d'un connaissement limitant en cas d'avaries le montant de l'indemnité à payer pour les marchandises, n'ont de valeur que pour les avaries de route, dont l'armateur peut s'exonérer en totalité ou en partie.*

*Mais elle ne peuvent être opposées pour des avaries provenant du fait personnel de l'armateur ; en pareil cas, aux termes de l'article 1382 du Code civil, il est obligé de réparer le dommage dans son intégralité.*

Cie GÉNÉRALE TRANSATLANTIQUE *c.* DEVOTO.

ARRÊT

MOYEN UNIQUE.—Violation et fausse application des articles 1134 et 1152 du Code civil, fausse application de l'article 1382 du même code ; violation des articles 103 et suivants du Code de commerce, des articles 283, 286 et 397 même code, et 7 de la loi du 20 avril 1810 ; en ce que ledit arrêt a formellement violé les termes clairs et précis d'un connaissement d'après lesquels l'indemnité due par la Compagnie Transatlantique pour perte et avaries de marchandises dont elle était responsable, devait être calculée d'après la valeur de ces marchandises *au port de charge*.

"LA COUR,

Sur le moyen unique,

Attendu qu'à la suite de l'échouement du steamer *Versailles* dans le port de Marseille, par une circonstance dont la Compagnie Transatlantique a été déclarée personnellement responsable, les réclamateurs de cafés et de sucres atteints par l'eau de mer ont demandé à titre de dommages-intérêts la différence entre le net produit de leurs marchandises en vente publique et

## COURT OF CASSATION—CHAMBER OF REQUESTS.

**Bills of Lading.—Clause limiting responsibility.—Damage on the voyage.—How applied.—Personal act of the shipowner.—Not applicable.—Art. 1382 Civil Code.**

Ship: VERSAILLES.

The clauses of a bill of lading, which limit the amount of indemnity to be paid for the merchandise in case of damage, are unavailable except in the case of damage in transit for which the shipowner can exonerate himself in whole or in part.

But they cannot be raised in the case of damage resulting from the personal act of the shipowner; in such a case, in conformity with the terms of Article 1382 of the Civil Code, he is obliged to make good the whole damage.

The Company Transatlantique *v.* Devoto.

DECISION.

Only ground: Violation of and improper application of Articles 1134 and 1152 of the Civil Code, improper application of Article 1382 of the same Code; violation of Articles 103 *et seq.* of the Code of Commerce, of Articles 283, 286 and 287 of the same Code, and Article 7 of the law of April 20, 1810; inasmuch as the said decision has formally violated the clear and precise terms of a bill of lading, according to which the indemnity due from the Compagnie Transatlantique for loss and damage to merchandise, for which it was responsible, ought to have been calculated according to the value of the merchandise "at the loading port."

The Court

On the only ground:

Whereas, in consequence of the stranding of the steamer *Versailles*, in the port of Marseilles, in consequence of a cause for which the Compagnie Transatlantique has been declared personally liable, the claimants of the coffee and the sugar damaged by sea water, have claimed as their damage, the difference between the net proceeds of their merchandise at public sale and the price which they would have received, if they had been able to sell them on arrival in a sound condition; the company having opposed article 19 of the bill of lading,

le prix qu'ils en auraient retiré s'ils avaient pu les vendre à l'arrivée en état sain ; que la Compagnie a opposé l'article 19 du connaissement aux termes duquel "en cas de perte ou d'avarie elle ne peut être tenue de rembourser que la valeur intrinsèque de la marchandise calculée au port de charge ;"

Attendu qu'en décidant que cette clause visait seulement les avaries de route dont l'armateur pouvait se décharger en tout ou en partie, et non les avaries provenant du fait personnel de la Compagnie, obligée par l'article 1382 à réparer l'intégralité du dommage, la Cour de Paris, par arrêt du 3 mars 1896, n'a fait que préciser l'intention commune des parties et a interprété, sans la dénaturer, la convention, objet du débat ;

Rejette."

Du 3 mars 1897.—Présid.: M. Tanon ; MM. Letellier, rapp.; Duval, av. gén.; Me Dambeza, av.

(*Revue internationale du Droit maritime*, vol. XII., p. 660.)

according to the terms of which, "in case of loss or damage, it cannot be held liable to pay more than the intrinsic value of the merchandise, computed at the port of loading."

Whereas, in deciding that this clause applied solely to damages in transit, for which the shipowner could have exempted himself in whole or in part, and not to damages resulting from the personal acts of the company, which it was obliged by Article 1382 to make good in full; the Court of Paris, by its decision of March 3, 1896, has done no more than to express more precisely the mutual intention of the parties, and has interpreted, without misconstruing the contract, the object of the controversy,

Rejected.

March 3, 1897.—Pres. M. Tanon; MM. Letellier, Rapp.; Duval, Advocate General; Mr. Dambeza, Atty.

## TRIBUNAL DE COMMERCE DU HAVRE.

(18 juin 1894.)

### SOCIÉTÉ COMMERCIALE D'AFFRÈTEMENTS CONTRE HUNTER

JUGEMENT

Attendu que la Société commerciale d'affrètements et de commission a fait assigner le capitaine Hunter pour s'entendre condamner à réparer le préjudice qui lui a été causé par la soustraction d'une portion de cargaison faite en cours de voyage par l'équipage du steamer *Mabel ;*

Vu le rapport :

Attendu qu'il résulte tant du constat d'huissier du 28 février dernier que du rapport d'expert et des circonstances de la cause, que le fait même de la soustraction est suffisamment établi et ne peut être sérieusement contesté par le capitaine ; que la quantité de charbon soustraite a été également fixée par l'expert à un chiffre total de 11.171 kilogrammes qui doivent être retenus au débat comme établissant la quantité du déficit ; que dans ces conditions, il ne reste plus qu'à examiner : 1° si le capitaine est responsable des agissements de l'équipage et si l'armateur, contre lequel le demandeur conclut également, a commis une faute pouvant engager sa responsabilité ; 2° si les chiffres indiqués par le demandeur comme représentant le montant du préjudice causé peuvent être admis ;

Sur le premier point :

Attendu, d'une part, que, sans vouloir prétendre que le capitaine Hunter a eu connaissance de la soustraction faite par l'équipage, il convient de décider qu'il est responsable, non seulement du fait de ses préposés en vertu de l'article 1384, mais encore de sa propre négligence en vertu de l'article 1383 du Code civil ; qu'il n'existe aucun doute à cet égard ; que, d'autre part, l'armateur, que les clauses du connaissement mettent, il est vrai, à l'abri d'une condamnation pour négligence, faute ou erreur de jugement des pilote, capitaine, matelots ou autres serviteurs du navire, ne peut voir sa responsabilité engagée que par une faute personnelle ; que cette faute se trouve suffisament indiquée dans l'aménagement intérieur

## TRIBUNAL OF COMMERCE OF HAVRE.

June 18th, 1894.

### COMMERCIAL CHARTERING SOCIETY *v.* HUNTER.

DECREE

Whereas, the Commercial Chartering and Commission Society has had Captain Hunter summoned in order that he may be condemned to make good the damage which has been caused to it by the substraction of a part of the cargo during the voyage of the steamer *Mabel*, by her crew ;

Having examined the report :

Whereas it appears from both the examination of the court officer, of February 28th last, and from the expert's report and the circumstances of the case, that the fact itself of the substraction is sufficiently established, and cannot be seriously contested by the captain ; that, the quantity of coal substracted has also been fixed by the expert at a total of 11.171 kilogrammes, which should be considered in the discussion as settling the quantity of the deficit ; that, under these circumstances there remains to examine only—

1st. Whether the master is responsible for the doings of the crew, and whether the owner, against whom the plaintiff brings action as well, has committed a default involving his responsibility.

2d. Whether the figures presented by plaintiff as representing the amount of damage should be accepted.

*On the first point* :

Whereas,on the one hand, that without wishing to pretend that captain Hunter had knowledge of the substraction done by the crew, it is proper to decide that he is responsible, not only for the doings of those under him, as per Article 1384, but further for his own negligence as per Article 1383 of the Civil Code ; that, there is no doubt as to this : that, on the other hand, the owner, whom the clauses of the bill of lading, it is true, shelter from a condemnation for negligence, default or error in judgment of the pilot, master, seamen or other employees of the ship, can only be held responsible for a per-

du steamer dont la défectuosité incombe certainement à l'armement ; qu'il a été constaté, en effet, qu'à un mètre du foyer de la machine existait une vanne en fer ne possédant aucun mode de fermeture qui puisse empêcher de l'ouvrir ; que cette disposition permettait donc à l'équipage de faire des soustractions dans la cargaison, même à l'insu du capitaine, ce qui aurait pu être facilement évité en pratiquant à cette vanne un mode de fermeture quelconque ; que vainement l'armateur alléguerait encore que cette disposition est celle conforme aux usages et à la pratique maritimes ; qu'elle est utile dans certains cas, notamment dans les longs voyages, pour lesquels les soutes à charbon n'étant pas assez grandes, on est obligé de mettre une partie du charbon destiné au navire dans la cale à l'endroit même où cette vanne est pratiquée ; qu'enfin un simple cadenas ne présenterait qu'une faible résistance et ne serait, par suite, pas une fermeture efficace, qu'en admettant même que l'existence de cette vanne soit nécessaire pour les cas indiqués, il ne s'ensuit pas qu'elle ne doive pas avoir un mode de fermeture possible et pratique ; qu'il existe des modes de fermeture autres qu'un simple cadenas et qui suffiraient pour rendre l'ouverture de la vanne impossible ; que l'armateur, en conservant à son steamer un aménagement aussi défectueux, *a donc commis une faute personnelle qui ne lui permet pas d'invoquer à son profit les clauses du connaissement et de la charte-partie ;*

Par ces motifs,

Le Tribunal, etc.

Du 18 juin 1894.—Prés.: M. Alfred Lecocq ; plaid.: Me Guerrand et Begouen.

*Revue internationale du Droit maritime* (t, X., p. 248.)

sonal default ; that, this default is sufficiently shown in the interior installation of the ship, the defective condition of which certainly is to be charged against the owners ; that, it has been proven, for that matter, that at the distance of a meter from the furnace of the engine there was an iron sluice, without anything to close it which would prevent it from being opened ; that, this arrangement allowed the crew to subtract cargo, even without the knowledge of the master, which could have been easily avoided by attaching to this sluice some sort of lock ; that, the owner would vainly allege that the present arrangement is in accordance with maritime usage and practice ; that it is useful in certain cases, notably on long voyages, for which the bunkers are not big enough, when it is necessary to put a part of the ship's coal in the hold, at the place where this sluice is made ; that, finally, a simple padlock would only offer a feeble resistance and would not besides be an efficient lock—that, admitting even that the existence of this sluice be necessary in the cases shown, it does not follow that it ought not to have some possible and practical manner of locking it ; that there exist other ways of locking besides a simple padlock, and which would suffice to render the opening of the sluice impossible ; that, the owner in keeping such a defective arrangement on his steamer has committed a personal default which does not allow him to invoke to his profit the clauses of the bill of lading and charter party ;

For these reasons :

The Tribunal, etc., of the 18th June, 1894—President, Mr. Alfred Lecocq ; Pleaders, Messrs. Guerrand and Begoüen.

Capitaine.—Armateur.—État défectueux du Navire.—Faute d'arrimage.—Responsabilité.—Clause de non responsabilité.

*Le capitaine est responsable des avaries aux marchandises, à moins qu'il prouve qu'elles sont dues à des fortunes de mer.*

*La rupture de la soute à lest d'eau n'est pas présumée provenir des fortunes de mer ; une expertise pourrait établir qu'il en est ainsi ; mais un certificat d'inspection donné antérieurement par les experts du Lloyd n'est pas une preuve suffisante.*

*Lorsque le connaissement libère les armateurs "des fautes et négligences du capitaine, du pilote et des marins," les fautes d'arrimage ne sont pas comprises dans cette exemption.*

*Les armateurs ne peuvent s'exonérer des avaries provenant de l'état défectueux du navire, de son défaut de réparations et d'entretien.*

(Rondeau, Nos et Stetten et Selb et Huverstuhl contre Capitaine Bergwitz.)

JUGEMENT.

Vu l'exploit de citation du 13 novembre 1886, enregistré, tendant au paiement de fr. 10,000 de dommages-intérêts pour avaries à une partie bois de chêne ;

Vu le procès-verbal des experts De Paepe, Falk et Demblon ; nommés pour rechercher les causes des avaries, procès-verbal déposé par acte enregistré du 14 décembre 1886 ;

Vu le rapport d'arrimage fait par les experts Uyttenhoven, Govaerts et Férauge, rapport déposé par acte enregistré du 30 novembre 1886 ;

Vu le rapport de mer du capitaine Bergwitz, enregistré sur extrait le 8 janvier 1887 ;

Attendu que les experts De Paepe, Falk et Demblon ont constaté que les avaries au chargement bois proviennent de l'eau de mer qui s'est introduite au fond de la cale par la paroi d'une soute à lest qui n'était pas étanche ; de plus le canal des anguilliers était obstrué par du ciment, et les lumières de la cloison de séparation par un amas de grains et de saletés ; ils

## (COURT OF CASSATION OF BELGIUM.)

Master.—Shipowner.—Defective condition of the vessel.—Faulty stowage.—Liability.—Non-responsibility clause.

The captain is responsible for damage to the merchandise, provided he does not prove that it was due to the perils of the sea.

The breaking of the water tank is not presumed to be due to the perils of the sea; a judicial survey could possibly establish that this was the case, but a certificate of inspection given previously by the experts of Lloyds, is not sufficient proof.

While the bill of lading frees the shipowners for "the faults and negligence of the captain, pilot and the mariners," faulty stowage is not comprised in this exception.

The shipowners cannot exonerate themselves from damage resulting from the defective condition of the vessel, from its faulty repairs and maintenance.

(Rondeau, Nos et Stetten et Selb et Huverstuhl against Captain Bergwitz.)

DECREE.

Having seen the citation filed November 13, 1886, calling for the payment of 10,000 frs. for damages and interest, for damage to some oak lumber;

Having seen the opinion of the experts De Paepe, Falk and Demblon, appointed to ascertain the cause of the average, which opinion was deposited according to law and registered December 14, 1886;

Having seen the stowage report made by experts Uyttenhoven, Govaerts and Férauge, which report was deposited according to law and registered November 30, 1886;

Having seen Captain Bergwitz's protest, an extract of which was registered January 3, 1887;

Whereas the experts De Paepe, Falk and Demblon have shown that the damage to the cargo of lumber was caused by sea water, which had ingress to the bottom of the hold, from one of the partitions of the ballast tanks, which was not watertight; furthermore the limber channels were obstructed by cement, and the limber hole of the separating bulkhead by a heap of grain and dirt, they did not see traces of an extraordi-

n'ont pas vu de traces d'une fatigue extraordinaire du navire par fortune de mer, et sont d'avis que les avaries sont dues à l'état défectueux de la soute à lest et du vaigrage des fonds de cale ;

Attendu que par exploit enregistré du 12 novembre 1885, il a été protesté contre le capitaine Bergwitz, à la requête de Rondeau, Nos et Stetten ; que si la réception a été faite par Selb et Huverstuhl, qui n'ont pas protesté en leur nom, la réclamation n'en reste pas moins recevable, Rondeau et Cie étant les mandants de Selb et Huverstuhl, ce que le capitaine savait ;

Attendu que le défendeur soutient à tort que le rapport d'arrimage attribue à des fortunes de mer l'avarie aux marchandises ; les experts arrimeurs sont d'accord avec les experts contradictoires pour dire que les planches ont été mouillées par le mauvais état de la soute à lest d'eau, par la disposition défectueuse des vaigres des fonds, et la condamnation du canal des anguilliers ;

Attendu que le défendeur soutient que la rupture de la soute à lest est due à des fortunes de mer et il invoque à cet égard son rapport de mer affirmé par l'équipage ; mais cette appréciation contredite par les experts comme il est dit ci-dessus, n'est corroborée par rien ; le rapport de mer lui-même se borne à affirmer que le navire a subi des tempêtes, qu'il a pris une bande etc., mais ne parle de la soute à lest que pour dire qu'elle s'était vidée de 8 pouces en 10 heures, et que la bande du navire augmentait quand on vidait la soute ;

Dans ces conditions, il incomberait au défendeur de démontrer par une expertise que la rupture de la soute était due aux fatigues et aux évènements du voyage, ce qu'il n'a pas fait ; sous ce rapport, l'inspection faite le 28 novembre 1885 par les experts du Lloyd ne peut prévaloir contre le fait ; il est constant que la soute n'est plus étanche, l'armement doit justifier ce mauvais état du navire ;

Attendu que le capitaine défendeur doit donc être déclaré responsable des avaries ;

Attendu que le défendeur, prenant personnellement pour lui toute la responsabilité, soutient qu'il ne peut être tenu comme le mandataire des armateurs, parce que les conditions du transport libèrent l'armateur de toutes les conséquences des fautes et négligences du capitaine ;

nary labor of the vessel by a peril of the sea, and they are of opinion that the damages are due to the defective condition of the ballast tank and of the floor ceiling of the hold;

Whereas by the objection filed November 12, 1886, a protest was entered against Captain Bergwitz at the request of Rondeau, Nos and Stetten; that if Selb and Huverstuhl received the goods, who did not protest in their own name, the claim is none the less acceptable, Rondeau & Co. being the constituents of Selb and Huverstuhl, which fact the captain knew;

Whereas the defendant maintains wrongfully, that the report of the stowage attributes the damage to the goods to perils of the sea, the expert stevedores are agreed with the opposing experts in saying that the lumber was wetted by the poor condition of the ballast tank, by the defective disposition of the planks of the ceiling, and the condemnation of the channel of the limbers;

Whereas the defendant maintains that the breaking of the ballast tank is due to perils of the sea and he refers for this purpose to his marine protest, affirmed by the crew; but this protest is contradicted by the experts as is hereinabove stated, and is uncorroborated; the marine protest itself is limited to affirming that the vessel encountered storms, that it took a list, &c., but merely speaks of the ballast tanks, that they ran out 8 inches in 10 hours, and that the list of the vessel increased when the tank was emptied.

In these conditions it devolved upon the defendant to show by an expert examination that the break of the tank was due to straining and to the events of the voyage; which he has not done; by the report, the inspection made November 28, 1885, by the experts of the Lloyds cannot prevail against the facts; it is certain that the tank is no longer water tight and the owners must justify the bad condition of the ship;

Whereas the defendant master must be declared responsible for the damages;

Whereas the defendant, taking personally for himself all the responsibility, maintains that he cannot be held as representative of the shipowner, because the conditions of the transport absolved the shipowner from all the consequences of the fault and negligence of the master;

Whereas faults of stowage are not expressly exempted, and we cannot presume that the expression "the faults and negli-

Attendu que les fautes d'arrimage ne sont pas expressément exemptées, et qu'on ne peut présumer que l'expression : *les fautes et négligences du capitaine, du pilote et des marins*, comprenne les fautes dans l'arrimage, celui-ci n'étant généralement pas le fait exclusif du capitaine, mais également des agents spéciaux des armateurs, et même parfois le fait exclusif de ces derniers ; que si l'on avait voulu décharger les armateurs des fautes de leurs agents spéciaux, ils auraient eu soin de mentionner expressément les fautes de *stowage* ;

Mais, attendu que si les circonstances relevées dans la présente cause impliquent des fautes d'arrimage, elles accusent en même temps l'état défectueux du navire, son défaut de réparations et d'entretien, ce dont les armateurs ne se sont pas déchargés et ne peuvent pas s'exonérer ;

Qu'à tous les points de vue donc, la condamnation qui doit intervenir contre le capitaine Bergwitz, doit l'atteindre en sa qualité de représentant de l'armement du steamer *Knight Templar ;* et que pour les motifs developpés ci-dessus il ne peut pas être davantage question de ranger en avaries communes le dommage réclamé par les demandeurs :

Quant au montant du dommage :

Attendu que l'avarie a été évaluée de commun accord à fr. 4,000, indépendamment des frais d'allège, d'expertise, de caution, etc. ; que les frais doivent suivre le sort du principal, et incomber au capitaine au même titre ; qu'ils s'élèvent suivant justification à fr. 434 plus fr. 235.80 pour frais d'expertise, sous réserve des frais de saisie ;

Par ces motifs,

Le Tribunal, rejetant toutes fins contraires, condamne le défendeur Bergwitz, tant en son nom personnel que comme représentant de l'armement, à payer aux demandeurs fr. 4,669.80 avec les intérêts judiciaires et les dépens ; déclare le présent jugement exécutoire nonobstant appel mais moyennant caution, les demandeurs Rondeau, Nos et Stetten étant étrangers.

Du 20 avril 1887.—1re Ch.—Mm. Lambrechts, Van de Vin et Fassbender, juges.—Pl. Mes. Maeterlinck et Sheridan.

*Jurisprudence du Port d'Anvers 1887* (p. 142).

gence of the captain, of the pilot and of the mariners," include the faults in stowage, these not being ordinarily the exclusive affair of the captain, but equally of the special agents of the shipowners, and even at times, the exclusive affair of the latter; that if it had been the intent to discharge the shipowners from liability for faults of their special agents they would have taken care to mention specially faults in stowage;

But whereas the circumstances brought out in the present cause imply faults in stowage, they at the same time point to the defective conditions of the vessel, its want of repairs and proper maintenance; concerning which the shipowners have not discharged themselves, and cannot exonerate themselves;

That, therefore, from the various points of view, the condemnation which must ensue against Captain Bergwitz must be in his capacity as representative of the owners of the steamer *Knight Templar;* and on the grounds above stated no claim can be made to distribute in general average the damages recoverable by the plaintiffs.

As to the amount of damage:

Whereas the damage has been fixed by consent at 4,000 francs, independently of the expenses of lighterage, of having expert investigations, of giving security, &c., that the expenses must follow the fate of the principal, and fall on the captain under the same head; that they amount according to the voucher to 434 francs, with 235.85 francs expenses for the expert investigation, saving the expenses of seizure.

For these reasons:

The Tribunal, overruling all contrary pleas, condemns the defendant Bergwitz, as well personally as also as representative of the owners, to pay to the claimants 4,669 francs, together with legal interest and costs; declares the present judgment collectible notwithstanding an appeal, but by means of security, because the plaintiffs Rondeau, Nos and Stetten are foreigners.

April 20, 1887, 1st Chamber, Messrs. LAMBRECHTS, VAN DE VIN and FASSBENDER, Judges. Counsel, Messrs. MAETERLINCK and SHERIDAN.

1°. Capitaine.—Avarie à la cargaison.—Voie d'eau.—Pompes.—Navire dans le port.—2°. Connaissement.—Clause de non responsabilité.—Étendu.—Doute.

1°. *Dans le cas où, par suite d'une fortune de mer, l'eau a pénétré dans le tunnel de l'hélice, puis dans le collecteur, et que les pompes ont empêché que le niveau de l'eau ne s'élevât de manière à causer du dommage dans les cales, le devoir du capitaine est de veiller, après l'arrêt des pompes, c'est-à-dire quand le navire est dans le port, à ce que l'eau ne s'infiltre dans les cales.*

2°. *La clause du connaissement aux termes de laquelle les armateurs ne sont pas responsables des pertes et du dommage, résultant de collision, échouement, jet ou autres fortunes de mer, rivière ou navigation de quelque nature qu'elle soit, même lorsqu'elle aura été causée par négligence, défaut ou erreur de jugement des pilote, capitaine, matelots ou autres serviteurs du navire, prévoit les accidents qui auraient été provoqués ou aggravés par des fautes dans la conduite du navire, pendant qu'il était soumis aux risques propres de la navigation ; mais elle ne peut être étendue à un défaut de soins dans la conservation de la marchandise après que le navire était amarré dans le port.*

*En cas de doute sur la portée d'une clause dérogatoire au droit commun et dont l'application doit être entendue restrictivement, c'est contre celui qui l'a stipulée à son profit que le doute doit s'interpréter.*

(Greenock Steamship Co. contre Wolkaemmerei.)

ARRÊT.

Attendu que s'il est établi, par les constatations des experts, que l'introduction de l'eau dans le tunnel de l'hélice du steamer *Bothwell Castle* et, de ce tunnel, dans le collecteur, a été le résultat d'une fortune de mer, il en ressort cependant aussi la preuve qu'aussi longtemps que, par la marche des machines actionnant le propulseur, les pompes étaient mise en mouvement, l'épuisement du collecteur ou toptank ne laissait pas à

## (COURT OF CASSATION OF BELGIUM.)

1°. Captain—Damage to Cargo—Leak—Pumps—Vessel in Port.

2°. Bill of Lading — Non-liability Clause — Construction—Doubt.

1°. Where through a sea peril, water penetrates into the shaft tunnel, thence into the well, but the pumps have kept down the water, so as not to do damage in the hold, it is the duty of the master, after the pumps are stopped (that is to say, when the vessel is in port) to see that the water does not infiltrate into the hold.

2°. The clause in the bill of lading, according to the terms of which, the owners are not liable for loss or damage, resulting from collision, stranding, jettison or other perils of the sea, rivers or navigation of whatever nature they may be, even when caused by negligence, fault or error in judgment of the pilot, captain, mariners, or other persons in the service of the vessel contemplates accidents that may be induced or aggravated by faults in the conduct of the vessel, while it was exposed to the risks incident to the navigation ; but it cannot be extended to include a want of care in the preservation of the goods, after the vessel has been moored in port.

In case of doubt, as to the import of a clause in derogation of the common law, and which when used must be construed strictly, the doubt should be interpreted against him who has inserted the clause for his own benefit.

GREENOCK STEAMSHIP CO. AGAINST WOLKAEMMEREI.

DECREE.

Whereas it is established by the opinions of the experts that the introduction of water into the shaft tunnel of the steamer *Bothwell Castle*, and from this tunnel, into the well, was the result of a peril of the sea, it also appears nevertheless, that as long as the movement of the machinery which propelled the screw, kept the pumps going, the emptying of the well or top tank, left nothing to be desired, and that the water line did not rise sufficiently to do damage in the holds ;

That the introduction of water into compartment 3 of the

désirer, et que le niveau de l'eau ne s'élevait pas de manière à causer du dommage dans les cales ;

Que l'introduction des eaux dans le compartiment No. 3 de celle-ci, où étaient déposées les balles de laine, n'a pu avoir lieu qu'après l'arrêt des pompes, c'est-à-dire quand le navire était dans le port ;

Attendu qu'à ce moment, le capitaine avait le devoir de veiller à ce que le trop plein du collecteur ne s'infiltrât pas dans les cales ;

Qu'il semble y avoir songé puisque, d'après ce qui a été rapporté aux experts dans leur visite du navire, il aurait fait boucher, par des tampons de bois, les trous des anguillers, précaution qui fut d'ailleurs insuffisante pour rendre les cales étanches ;

Attendu que, d'après les qualités du jugement *a quo*, les appelants se sont fait un moyen de défense de ce que les pompes, étant dépendantes des machines propulsives, devraient cesser de fonctionner en même temps que celles-ci ;

Attendu que c'était là reconnaître qu'après l'arrêt du navire, on avait cessé d'épuiser les eaux ;

Qu'à la vérité, ils offrent aujourd'hui de prouver qu'ils ont mis les pompes en mouvement à l'aide de la petite machine ou Donkey, mais que cette allégation tardive est controuvée par leur aveu, comme aussi par tous les éléments de fait acquis à la cause ;

Quant à la clause de la convention verbale d'affrètement d'après laquelle les appelants soutiennent être exonérés de la responsabilité des avaries dans le cas de l'espèce ;

Attendu que cette clause, dont les termes sont reconnus, excepte de la règle commune les pertes ou dommages résultant de collision, échouement, jet et autres fortunes de mer, rivière ou navigation, de quelque nature ou sorte qu'elle puisse être, même lorsqu'elle aura été causée par négligence, défaut ou erreur de jugement du pilote, capitaine, matelots et autres serviteurs des armateurs ;

Attendu qu'il s'agit là d'accidents qui auraient été provoqués ou aggravés par des fautes dans la conduite du navire, pendant qu'il était soumis aux risques propres de la navigation ;

Qu'on ne peut étendre cette exception à un défaut de soins dans la conservation des marchandises après que le navire est amarré dans le port ;

hold, where the bales of wool were stored, could not have taken place, until after the stoppage of the pumps, that is to say, when the vessel was in port;

Whereas at that moment, it was the duty of the captain to watch, that the overflowing water from the well did not run into the holds;

That it seems that he thought of this since, from what he reported to the experts on their visit to the vessel, it appears that he had the limber holds stopped up, by wooden bungs, a precaution which was, however, insufficient to render the holds water tight;

Whereas from the findings of the judgment below the appellants have put forward a ground of defense in that the pumps being dependent on the motion of the propelling machinery, were obliged to stop, at the same time when it stopped; whereas it was evident that after the stopping of the vessel, they ceased to take out the water. As to the truth, they offer today to prove, that they put the pumps in motion, with the aid of a small or donkey engine, but this allegation is an afterthought offset by their admission, as also by all the elements of facts found in the cause.

As to the clause of the verbal agreement of affreightment, according to which appellants claim to be exonerated from liability for damage in a case of this kind;

Whereas this clause, the terms of which are admitted, excepts from the common rule, losses or damages resulting from collision, stranding, jettison and other peril of the seas, rivers or navigation, of whatever nature or kind they may be, even when they may have been caused by negligence, fault or error in judgment of the pilot, captain, mariners and other servants of the shipowner;

Whereas, if this covers accidents which may have been induced or aggravated by error in the conduct of the vessel while it was exposed to the risks incident to navigation;

That this exemption cannot be interpreted to include want of care in the preservation of goods, after the vessel is moored in port;

Moreover, if a doubt could exist as to the import of a clause in derogation of common law, and which must be construed strictly, then such a doubt must be interpreted against him who has inserted the clause for his own benefit;

Qu'au surplus, si un doute pouvait subsister sur la portée d'une clause dérogatoire au droit commun et dont l'application doit être entendue restrictivement, c'est contre celui qui l'a stipulée à son profit que ce doute devrait s'interpréter ;

Par ces motifs et ceux du premier juge,

La Cour, rejetant la preuve offerte par les appelants, déclare ceux-ci sans griefs : les déboute en conséquence de leur appel et les condamne aux dépens.

Du 24 octobre 1890.—5me Ch.—M. Terlinden, prés.—Pl. Mes. Hayvaert et Van Meenen.

*Jurisprudence du Port d'Anvers 1891* (pp. 31-34).

For these reasons, and for those of the first judge, the Court, rejecting the proof offered by the appellants, declares that they are not aggrieved, and in consequence rejects their appeal, and condemns them for costs.

Oct. 24th 1890, 5th Ch., M. FERLINDEN, pres. Advocates, Messrs. HEYVAERT and VAN MEENEN.

**Connaissement. — Clause d'irresponsabilité. — Avaries.— Echauffement des grains.— Mauvaise construction des soutes.**

*Sous l'empire de la clause "**les armateurs sont exonérés des** conséquences de la chaleur, même si elles **sont** occasionnées par la faute et la négligence du capitaine," les armateurs ne peuvent invoquer leur irresponsabilité, lorsque l'avarie provient de deux causes combinées ; la construction défectueuse du steamer pour transporter des grains dans ses soutes, et la faute du capitaine de les y avoir logés.*

*Les armateurs ont commis une faute et une négligence personnelle en ne défendant pas au capitaine de loger des grains dans ces compartiments.*

(Jos. Claessens contre Capitaine Townsend.)

JUGEMENT.

Vu les rétroactes de la cause ;

Vu l'exploit d'avenir enregistré du 19 janvier 1889, tendant au payement de fr. 3,648.22 de dommage-intérêts, plus fr. 478.58 pour frais ;

Attendu que l'avarie aux orges du demandeur est due à l'échauffement provenu de leur arrimage dans les soutes voisines de la chambre des machines, soutes dont les parois laissaient pénétrer la chaleur, parcequ'elles n'étaient pas revêtues de cloisons en bois ;

Attendu que le défendeur se reconnait personnellement responsable des avaries, mais soutient que les armateurs du steamer ne sont pas tenus ;

Attendu qu'aux termes de la convention de transport, les armateurs sont exonérés des conséquences de la chaleur, même si elles sont occasionnées par la faute et la négligence du capitaine ;

Mais, attendu que l'avarie dont question au présent procès provient de deux causes combinées : la construction défectueuse du steamer pour transporter des grains dans ses soutes, et la faute du capitaine de les y avoir logés ;

Les armateurs ont su que les grains seraient logés dans ces

## (COURT OF CASSATION OF BELGIUM.)

Bill of Lading.—Clause of Irresponsibility.—Damages.—Heating of Grain.—Bad Construction of the Tanks.

Under authority of the clause "shipowners are exonerated from the consequences of heat, even if it is occasioned by the fault and the negligence of the captain," the shipowners are not permitted to invoke their exemption when the damage results from two causes combined; the defective construction of the steamer for transporting the grain in its tanks, and the fault of the captain in having stowed it there.

The shipowners have committed a fault and a personal negligence in not prohibiting the captain from stowing the grain in these compartments.

(Jos. Claessens against Captain Townsend.)

DECREE.

Having seen the preceding documents in the cause;

Having seen the executory judgment filed January 19, 1889, directing the payment of 3,648.22 francs for damages and interest plus 478.58 francs for expenses;

Whereas, the damage to the plaintiff's barley is due to heating, caused by its stowage in the tanks adjoining the engine-room; tanks, the sides of which allowed the heat to pass through, because they were not covered with a wooden partition;

Whereas the defendant acknowledged himself personally liable for damages, but insists that the owners of the steamer are not liable;

Whereas, according to the terms of contract of carriage, the owners are exonerated from the consequences of heat, even if it is occasioned by the fault and the negligence of the captain;

But whereas the damage in question in the present case results from two combined causes, the defective construction of the steamer for carrying grain in its tanks, and the fault of the captain in having stowed it there;

The owners knew that grain was to be stowed in these tanks; at least it is incumbent on them to prove the contrary, and to establish that it was unknown to them that the charter-party was made which authorized the stowage of grain in that place; but they do not offer any proof, and do not even set

soutes ; au moins devraient-ils prouver le contraire, et établir que c'est à leur insu qu'a été faite la charte-partie qui autorisait l'arrimage du grain dans cet endroit ; or ils n'en offrent pas la preuve, et n'invoquent même pas pareille ignorance ; ils ont donc su que des grains seraient logés dans les soutes ; *dès lors ils ont commis une faute et une négligence personnelle, en ne défendant pas au capitaine de loger des grains dans ces compartiments ; ou encore la construction de cette partie du steamer est défectueuse pour pareille destination ;*

Attendu que le capitaine doit donc être déclaré responsable, tant comme représentant l'armement qu'en nom personnel ;

Quant au montant des sommes réclamées :

Attendu que le défendeur, après avoir réclamé des justifications quant aux fr. 478.58 de frais, a reçu ces justifications, et n'a plus fait d'objections ;

Par ces motifs,

Le Tribunal, rejetant toutes fins contraires, condamne le défendeur Townsend tant en nom personnel que comme représentant les armateurs du steamer *Harter* à payer au demandeur fr. 4,126.80 avec les intérêts judiciaires et les dépens, y compris les honoraires de l'expert Van Peborgh ; déclare le présent jugement exécutoire nonobstant appel et sans caution.

Du 27 avril 1889.—1re Ch.—Mm. Van Geetruyen, de Wael et Hertogs, juges.—Pl. Mes. Van Olffen et Vrancken.

*Jurisprudence du Port d'Anvers 1889* (pp. 240-242).

up such ignorance; they therefore knew that grain would be placed in the tanks; *from this, therefore, they have committed a fault and a personal act of negligence in not prohibiting the captain from placing grain in these compartments, where, moreover, the construction of this part of the steamer is defective for such purpose;*

Whereas the captain must therefore be declared responsible, both personally and as the representative of the owners;

As to the amount of the sum claimed:

Whereas the defendant, after having set up a claim to 478.58 francs for expenses; and having received same, and having made no further objections;

For these reasons:

The Court, rejecting all contrary pleas, condemns the defendant Townsend, as well personally as also as representative of the owners of the steamer *Harter*, to pay to the libellant 4,126.80 francs, with legal interest and costs, including in the latter the fees of expert Van Peborg; declares the present judgment executory notwithstanding an appeal and without security.

April 27, 1889. First Chamber.—Messrs. VAN GREETRUEN, DE WAEL and HERTOGS, Judges.—Counsel, Messrs. OLFFEN and VRANCKEN.

## GERMAN AUTHORITIES.

In the deliberations of the commission which prepared the Commercial Code of Germany, it was proposed to declare the carrier by sea liable only for diligence in his efforts to have the ship seaworthy. This was decisively rejected by the vote of 8 to 1. The reasons for refusing this proposed change were thus stated:

"Es sei nicht richtig, dass der Verfrachter nach der Auffassung des Verkehrs rücksichtlich der Lieferung des Schiffs in seetüchtigem Zustand blos für Diligenz zu haften habe. Er habe vielmehr, soweit dies im Bereiche der Möglichkeit liege, *rem ad usum habilem* zu prästiren, und deshalb nicht blos für seine eigenen Versehen oder für *culpa in eligendo*, wie dies bei Annahme des Antrags unter *a* der Fall sein würde, sondern auch für die Versehen der zur Herstellung und Reparatur des Schiffs verwendeten Schiffszimmerleute u. dgl. einzustehen; er hafte nicht blos für Diligenz, sondern für die Seetüchtigkeit selbst."

Protokolle der Kommission zur Berathung eines allgemeinen deutschen Handelsgesetzbuches. Vol. 8, p. 3848, Würzburg, 1863.

"Der Verfrachter hat dafür einzustehen, dass das von ihm gelieferte Schiff sich im seetüchtigem Stande befindet, d. h. nicht blos im Stande ist, überhaupt See zu halten, sondern die den Gegenstand des Frachtvertrags bildende Reise auszuführen. Er hat daher den durch die mangelhafte Beschaffenheit des Schiffs verursachten Schaden dem Befrachter zu ersetzen, und zwar nicht nur den, welcher durch eigenes Versehen in Betreff des Schiffs selbst (z. B. durch unterlassene Untersuchung desselben, Anordnung einer unzulänglichen Reparatur) oder in Betreff der Auswahl der zur Vornahme der Untersuchung und der etwa erforderlichen Reparaturen bestellten Personen (*culpa in eligendo*) sondern auch durch Versehen eben dieser Personen verursacht ist. Er haftet für jedweden Schaden, mag dieser im Verlust oder der Beschädigung von Gütern bestehen, mag er bestehen in der Verzögerung der Abreise, oder in der Unmöglichkeit überhaupt den Transport auszuführen. Doch wird für die Haftbarkeit des Verfrachters vorausgesetzt, dass die Mängel vorhanden waren zur Zeit, als das Schiff dem Befrachter zur Disposition gestellt wurde, und nicht erst nachher entstanden sind, ferner dass es nicht nach seemännischer Anshauung auserhalb der Möglichkeit lag, die Mängel zu entdecken."

Das Seerecht, von Lewis, Reatz, und Schroeder, p. 130, Leipzig, 1884.

It could not be right that the carrier, according to the commercial view, should be liable only for diligence in respect to furnishing the vessel in a seaworthy condition. He has rather, so far as lies within the limits of possibility, to warrant the *res* fit for use ; and therefore has to answer not only for his own faults, or for faults in selection (as would be the case by the adoption of the motion), but also for the faults of the shipwrights and others employed in the restoration and repair of the vessel. *He is answerable not merely for diligence, but for the seaworthiness itself.*

The carrier has to be responsible that the ship delivered by him shall be in a seaworthy state, that is, not merely in a state to go to sea, but to perform the voyage which is the subject of the affreightment contract. He is therefore responsible for damages to the charterer caused by the defective condition of the ship ; and not alone those from his personal defaults in regard to the vessel itself—such, for example, as omission to hold surveys, ordering insufficient repairs, or respecting his choice of people to take charge of surveys, and any repairs required (fault in selection)—but also for the defaults of even these persons.

He is liable for every damage, be it loss or injury to the goods, prolongation of the voyage, or even inability to complete the transport. However the liability of the carrier presupposes that the defects existed at the time the vessel was put at the charterer's disposal, and did not come into existence thereafter, further that, according to seafaring ideas, *it was beyond the bounds of possibility to discover the defects.*"

§ 51. Beschädigung der im Bunkerraum befindlichen Ladung durch das durch denselben hindurchgehende glühende Schornsteinrohr des Donkeykessels.—Liegt hierin ein Mangel in der Seetüchtigkeit des Schiffes?

Capitän H. Penney vom englishen Dampfer "Athena" gegen die Firma "Ehlers & Löwenthal zu Hamburg."

In dieser Hptbl. 1893 No. 95 referirten Sache verwarf das R.-G. am 17. März 1894 die Revision des Klägers.

ENTSCHEIDUNGS-GRNÜDE

Der Berufungsrichter geht davon aus, dass das Feuer im Bunkerraum durch das Rohr des Donkeykessels in Verbindung mit dem Umstande entstanden ist, dass das Rohr dem Trennungsschott zu nahe lag. Diese Feststellung ist nicht angegriffen, auch keinem Bedenken unterworfen.

Der Berufungsrichter macht die Rhederei für den durch das Feuer entstandenen Schaden nach Art. 560 (607) des H. G. B. und auf Grund des Connossements verantwortlich, weil in der Art der Anlage des Donkeykessels und seines Rohrs ein die Ladung im Bunkerraum erkennbar gefährdender und desshalb erkennbar mangelhafter Zustand des Schiffes, gegen den Schutzvorkehrungen hätten getroffen werden müssen, zu finden sei. Ist letzteres richtig, so liegen rechtliche Bedenken gegen die Haftung der Rhederei für den Schaden weder nach Art. 560 (607) des H. G. B. noch nach dem Connossement vor. Auf die weitere Begründung des Berufungsurtheils und die dagegen von der Revision erhobenen Angriffe kommt es dann nicht an. Die Rhederei hat sich zwar von Schaden durch Feuer freigezeichnet, nach dem Connossement gilt diese Freizeichnung aber nur unter der Voraussetzung der Seetüchtigkeit des Schiffes.

"And all the above exceptions are conditional on the vessel being seaworthy when she sails on the voyage."

Die Revision zieht dies auch nicht in Zweifel. Sie rügt an erster Stelle, dass der Berufungsrichter den Begriff der Seetüchtigkeit verkannt habe, aber ohne Grund.

Dem Berufungsrichter ist zunächst darin beizutreten, dass für die Entscheidung darauf nichts ankommt, dass die Ladung

§ 51. Damage to the cargo in the bunker space through the heated funnel of the donkey boiler which passed through it. Does this constitute want of seaworthiness of the vessel?

Captain H. Penney, of the English S. S. *Athena* vs. the firm of Ehlers & Loewenthal, of Hamburg.

In the case reported as No. 95 in the volume of 1893 of these Reports, the Imperial Court dismissed the appeal of the plaintiff on March 17th, 1894.

GROUNDS FOR DECISION.

The appellate Judge starts with the view, that the fire in the bunker space arose from the funnel in connection with the circumstance, that the funnel was too near the dividing bulkhead. This finding is not attacked nor in any way questioned.

The appellate Judge holds the ship-owner liable for the damage caused by the fire, under Art. 560 (607) of the German Commercial Code, and the bill of lading, because in the mode of arranging the donkey boiler and its funnel, a condition existed which was recognizable as endangering the cargo in the bunker space, and therefore a condition of the vessel perceptibly defective, against which precautions ought to have been taken.

If the latter is correct, then there are legal questions as to the liability of the ship-owners on account of the damage, either under Art. 560 (607) of the German Commercial Code, or pursuant to the bill of lading. No attention need then be paid to the further points raised by the Appellate judgment, or to the attacks on them by the appellants. It is true that the ship-owners have exempted themselves from liability for damage by fire, but according to the bill of lading, this exemption only holds good on the condition of the seaworthiness of the vessel.

> "And all the above exceptions are conditional on the vessel being seaworthy when she sails on the voyage."

The appellants do not question this. They assert, but without cause, that the appellate Judge mistook the meaning of seaworthiness.

First of all, the conclusion of the appellate Judge is to be concurred in, that for the purpose of the decision, it matters

von dem Brande erst bei der Löschung betroffen ist. Die allgemeine Verpflichtung, welche der Art. 560, Abs. 1 dem Verfrachter aus dem Frachtvertrage auferlegt, ist beim Zusammenhalt mit Art. 480 des H. G. B. dahin zu erstrecken, dass er ein Schiff stellt, welches geeignet ist, die Ladung ungefährdet zu transportiren. Ein Schiff, dass eine Anlage enthält, welche die Ladung und mit der Ladung nothwendig auch das Schiff der Feuersgefahr aussetzt, ist kein seetüchtiges Schiff. Das Urtheil des R.-G. in den Entsch. für Civils. Bd. 25, S. 104 steht dem in keiner Weise entgegen. Es giebt keine grössere Seegefahr als Feuersgefahr an Bord. Dass das Feuer auch während der Seereise bei Benutzung des Donkeykessels hätte enstehen können, liegt auf der Hand. Dass es erst während des Löschens der Ladung entstanden, ist hiernach namentlich auch für die Verpflichtung des Verfrachters aus dem *receptum* Art. 607 des H. G. B., gleichgültig. Und aus dem *receptum* wird geklagt. Denn die Beklagte nimmt den Kläger für Schaden in Anspruch, der ihr durch Verlust und Beschädigung des Guts vor der Ablieferung entstanden ist. Gegenüber der im Connossement enthaltenen Freizeichnung von Feuersgefahr hat die Beklagte zu beweisen, dass der Brand nicht auf höherer Gewalt beruht. Diesen Beweis hat sie nach der Feststellung, dass der Brand auf eine feuergefährliche, mangelhafte Anlage im Schiff und damit auf einen mangelhaften Zustand des Schiffes zurückzuführen ist, geführt. Sache des Klägers ist der Nachweis, dass der mangelhafte Zustand des Schiffes, d. h. hier die Feuergefährlichkeit der Anlage, aller Sorgfalt ungeachtet nicht zu entdecken war. Art. 560, Abs. 2; Art. 607, Abs. 2 des H. G. B., Prot. S. 2066 Entsch. des R. O. H. G., Bd. 23, S. 20, 22.

Die Feuergefährlichkeit der Anlage aber stellt der Berufungsrichter thatsächlich fest und darüber kann auch nach dem Gutachten der Sachverständigen Stammel, Sohst und Rohde gar kein Bedenken aufkommen. Die letzteren Beiden bekunden sogar, ihnen sei aus ihrer Praxis bekannt, dass wiederholt durch solche Anlage Feuer entstanden sei. Neben dieser objectiven Gefährlichkeit kommt darauf nicht an, ob und durch welche Vorsichtsmassregeln die Gefährlichkeit hätte beseitigt werden können, sondern nur darauf, ob der Verfrachter die Feuergefährlichkeit, aller Sorgfalt ungeachtet, nicht endecken konnte.

not, that the cargo was not touched by the fire, until it was being discharged. The general obligation which Art. 560, § 1 imposed on the carrier by the freight contract, is to be extended, when taken together with Art. 480 of the German Com. Code, so as to make it obligatory for him to furnish a vessel which is fit to transport the cargo unendangered. A vessel, that contains a plant which exposes the cargo, and with the cargo necessarily also the vessel, to the danger of fire, is not a seaworthy vessel. The decision of the Imperial Court in the reports for civil matters, Vol. 28, p. 104, is not opposed to this in any manner. There is no greater sea-peril than the danger of fire on board. It is apparent, that the fire could also have occurred by using the donkey boiler during the voyage. In view of these facts it is immaterial, that it first started during the discharge of the cargo, in considering the obligations of the carrier, arising out of the receptum of Art. 607 of the German Com. Code. And they are suing on the receptum. The defendants claim damages from the plaintiff, which they sustained by reason of loss and injury to goods before delivery. For the purpose of the exemption from fire contained in the bill of lading, the defendants must prove that the fire was not caused by *vis major*. They have proved this when they established the fact that the fire can be traced to a defective plant on board ship, exposed to the danger of fire, and thereby to a defect of the ship. It is for the plaintiff to show that the defective condition of the vessel, viz.: here the risk of fire from the plant, could not have been detected. Art. 560, § 2, Art. 607, § 2, of the German Com. Code.

The appellate Judge finds the plant was fire hazardous, and no doubt as to the fact can arise, on reading the opinions of the experts Stammel, Sohst and Rohde. The latter two even stated, that they know from their experience, that fire was repeatedly caused by such plants. In view of the objective danger it matters not, whether and by what precautions, the danger could have been removed, but only, whether the carrier could not have discovered the danger of fire with due diligence.

The appellate Judge denies this without infringing the law. In view of the above state of affairs, there can be no question whatever of a *latent defect in the objective sense of the word*. This the donkey boiler, its funnel, its nearness to the bunker

Der Berufungsrichter verneint dies ohne das Gesetz zu verletzen. Von einem verborgenen Mangel im objectiven Sinn kann nach der Sachlage überhaupt nicht die Rede sein. Der Donkeykessel, sein Rohr, die geringe Entfernung desselben vom Bunkerschott legen zu Tage.

Dass der Mangel auch subjectiv bezüglich seiner Feuergefährlichkeit erkennbar war, geht aus den Aussagen der beiden nautischen Sachverständigen Sohst und Rhode und der des Sachverständigen Sammel hervor. Die beiden bekunden, dass sie, weil wiederholt durch in dieser Art ausgeführte Anlagen des Donkeykessels Feuer enstanden sei, regelmässig darauf dringen, beim Löschen die Ladung wenigstens baldmöglichst von der gefährlichen Stelle oberhalb des Donkeykesselrohres zu entfernen. Sie bezeichnen es ausdrücklich als Unvorsichtigkeit im vorliegenden Falle, dass man nicht baldmöglichst an dieser Stelle gelöscht hat. Der Sachverständige Stammel aber bezeichnet es als einen Mangel an Vorsicht, dass man das Rohr nicht genügend beachtet und nicht rechtzeitig sein Rothglühen bemerkt hat. Der Berufungsrichter zieht daraus ohne Gesetzverletzung den thatsächlichen Schluss, es sei unmöglich, dass nicht schon in früheren Fällen jedesmal eine mehr oder minder grosse Erhitzung im Bunkerschacht an der besonders gefährdeten Stelle wahrgenommen wäre oder doch hätte wahrgenommen werden müssen. Dann kann aber nicht davon die Rede sein, dass die Feuergefährlichkeit, aller Sorgfalt ungeachtet, nicht zu entdecken gewesen sei. Es ist selbstverständlich, dass es dabei nicht auf die Person des verantwortlichen Verfrachters ankommt, sondern auch auf die Möglichkeit der Entdeckung durch eine der Personen, für die er verantwortlich.

Darauf, dass die in Rede stehende Anlage des Donkeykessels nicht ungewöhnlich ist, kommt ebensowenig etwas an, wie darauf, dass nach der Meinung der Sachverständigen Sohst und Rohde dem Kläger solche Anlage nicht zum Vorwurf gemacht werden kann, wenn er sein Schiff klassificirt bekommen hat. Das ist keine gutachtliche Deposition mehr, sondern eine Rechtsauffassung, die nichts entscheided und ganz hinfällig ist, weil die Classification kein Gewähr dafür giebt, dass das Schiff zur Zeit keine Mängel hat, und den Verfrachter von seiner Haftung für Mängel, die nicht unentdeckbar sind, überhaupt nicht befreit.

Hanseatische Gerichtszeitung 1894, p. 151.

bulkhead, demonstrate. That the defect was subjectively perceptible, in reference to its danger of fire, is shown by the testimony of the two nautical experts, Sohst and Rohde, and of the expert Stammel.

Both state, that, as fires frequently arise through the donkey boilers being put up in this manner, they regularly insist that in discharging, the cargo is at least removed from the dangerous place above the donkey boiler as soon as possible. They call it negligence in the case at bar, that the cargo was not discharged from this place as soon as possible. The expert Stammel calls it, want of care, that the funnel was not sufficiently considered, and its red hot conditions not noticed in time. The appellate Judge legally draws therefrom the conclusion of fact, that it is impossible, that a greater or less heating, in the bunker shaft was not noticed every time at its especially endangered place, in previous instances, or if not, then it ought to have been discovered. And it is then impossible to say, that this danger of fire could not have been discovered with due diligence. *It is self-evident, that this does not only refer to the person of the responsible carrier, but also to the possibility of discovery by a person, for whom he is responsible.*

It is of just as little moment to say that the donkey boiler, as arranged in this case, is not unusual, as it is to say, that according to the opinion of the experts Sohst and Rohde, this arrangement of the donkey boiler is not to be charged against the plaintiff, because his ship was given a class. This is no longer a deposition of an expert, but a conclusion of law, which decides nothing, and goes for naught, *because this classification is no guarantee that the vessel has no defects at the time,* and does not exempt the carrier from his liability for defects which can be discovered.

§35. Ist es ordnungsmässig, wenn die Wassertanks schon während der Entlöschung des Schiffes aufgefüllt werden? Denkbare Ursachen für die Wasseransammlung im unteren Laderaum. Unzureichender Verschluss des Mannloches ist stets als auf einer Nachlässigkeit der Schiffsbesatzung beruhend zu erachten.

Bezugnahme des Connossements auf die Chartepartie. Haben die Bestimmungen der Chartepartie auch dann für den Empfänger zu gelten, wenn dass Connossement nur besagt, dass die Waaren are to be delivered at the aforesaid port in the like good order as per charteparty.

Ist ein Unfall, der sich während der Löschung der Ladung am Bestimmungshafen beim Füllen eines Wassertanks ereignete, ein accident of navigation? Bei Freizeichnung von accidents of navigation haftet die Rhederei nur dann nicht für die Folgen eines solchen accident, wenn kein Verschulden der Rhederei oder Schiffsmannschaft vorliegt.

Sivewright, Bacon & Co. als Rheder des engl. Schiffes *Castleventry* gegen Anton Nielsen & Co. in Bremen.

In dieser Hptbl. 1894 No. 26 referirten Sache wies das O. L. G. III. durch Urtheil vom 14. Juli 1894 die Klage ab.

ENTSCHEIDUNGSGRÜNDE:

In dem Zwischenurtheil vom 31 October 1893 ist ausgeführt dass die hier fragliche Beschädigung der Ladung auf einem accident of navigation beruht, für den die Klägerin zu haften hat, wenn der Rhederei, den Schiffer oder die Schiffsmannschaft ein Verschulden trifft, und in diesem Sinne erklärt der entscheidende Theil jenes Urtheils, dass die beklagtische Kompensationseinrede unbegründet sei, soweit sie sich nicht auf das von der Beklagten behauptete schuldvolle Verhalten des Schiffers oder der Schiffsbesatzung des *Castleventry* bei Auffüllung der Wassertanks stütze. In den Gründen jenes Urtheils ist dann weiter ausgeführt, dass die Beweislast bezüglich des angeblichen Verschuldens wegen der im Connossement enthaltenen Befreiungsclausel (all the dangers and accidents of the seas and navigation excepted) die Beklagten treffe. Diese Ausführungen hält das Berufungsgericht auch jetzt noch für zutreffend. Die Beklagte meint freilich, wenigstens im gegenwärtigen Falle müsse die Beweislast umgekehrt und von der Klägerin verlangt werden dass sie sich exkulpire, weil der Capitain den Schiffsbesichtigern die genaue Feststellung der Schadensursache—und zwar, wie be-

§ 35. Is it proper to fill the water tanks during the discharge of cargo? Probable cause for the gathering of water in the lower cargo hold. Insufficient fastening of the manhole must always be considered as arising from negligence of the ship's crew.

Reference in the bill of lading to the charter-party. Do the provisions of the charter-party apply to the consignee in a case where the bill of lading merely provides that the goods are to be delivered at the aforesaid port in the like good order, as per charter-party?

Is an accident, which happens while filling the water tanks, during the discharge of the cargo, an accident of navigation? In case of an exemption from liability for accidents of navigation, the owners are only exempt from liability for the consequences of such an accident in case no fault exists on the part of the owner or ship's crew.

Sivewright, Bacon & Co., as owner of the English ship *Castleventry* against Anton Neilsen & Co., in Bremen.

In this matter, reported vol. of 1894, No. 26, the Upper Land Court* Part III., dismissed the complaint, by its decree of July 14th, 1894.

GROUNDS FOR DECISION.

It is set forth in the interlocutory decree of October 31, 1893, that the damage to cargo here in question was caused by an accident of navigation, for which the plaintiffs are liable, in case fault is shown either in the owner, or the ship's crew; and in this sense the decreeing portion of that decision sets forth that the defendants' counterclaim for compensation is unfounded, in so far as it is not based on the defendants' allegation of faulty conduct of the owner or the crew of the *Castleventry* in filling the water tanks.

In the grounds for that decision it is further set forth, that the burden of proof is on the defendants in reference to the alleged fault, on account of the exemption clause con-

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*The three German courts through which a maritime suit may be carried are: the *Landgericht* (Land Court) or civil court of first instance; the *Oberlandesgericht* (Upper Land Court), an intermediate appellate court; and the *Reichsgericht* (Court of the Realm), which is the imperial court of final instance, sitting at Leipzig. The opinion here first given is by the *Hanseatische Oberlandesgericht* of Hamburg, presided over by Dr. Sieveking. An extract from an earlier opinion in this same case is translated as a note to 69 Fed. Rep., 475.

hauptet werde, absichtlich dadurch unmöglich gemacht habe, dass er nach Beendigung der Löschung schleunigst den Hafen verlassen habe. Ob diese Behauptungen thatsächlich richtig sind, ob die Beklagte sich auf die Art. 609, 610 H. G. B. für eine Verpflichtung des Capitains bei der Ermittelung der Schadensursache mitzuwirken, berufen kann und ob eine Erschwerung oder Verhinderung der Besichtigung durch den Capitain eine Veränderung der Beweislast herbeiführen würde, kann hier jedoch unerörtert bleiben, da durch die Beweisaufnahme die Ursache des Schadens soweit aufgeklärt ist, dass ein Verschulden der Besatzung angenommen werden muss.

Wenn allerdings die Beklagte dem Schiffer schon daraus einen Vorwurf macht, das er vor Beendigung der Löschung überhaupt mit den Auffüllen der Wassertanks vorgegangen ist, und wenn sie behauptet, dass diese Massregel nur der demnächstigen Reise habe dienen sollen und können, mit der hier fraglichen Reise aber keinen Zusammenhang gehabt habe, so ist das nicht richtig. Der Capitain White behauptet, er habe die Tanks Auffüllen lassen sowohl im Interesse des Schiffes, nämlich um bei fortschreitender Entlöschung dessen Stabilität zu sichern, als auch im Interesse einer gefahrloseren Entlöschung der Ladung. Es sei nämlich das Gewebe der Reissäcke,—wie dies auch durch die Atteste der Schiffsbesichtiger bestätigt wird—dünn und mürbe gewesen und die ohnehin vorhandene Gefahr, dass die Säcke platzen würden, um so grösser geworden, je höher bei fortschreitender Löschung das Schiff aus dem Wasser gekommen und je steiler damit der Steg geworden sei, auf dem man die Säcke vom Schiff in die Leichter habe hinabgleiten lassen.

Die Bremerhavener Schiffsbesichter Heincks und Ihlder und der Zeuge Köper wollen diese Behauptung des Capitains nicht durchweg als richtig gelten lassen. Zeuge Köper, dem als einen früheren Schiffscapitain man soweit eine Sachkunde nicht wird Absprechen können, sagt, die Bauart des Schiffes habe die Einnahme von Wasserballast keineswegs erforderlich gemacht, denn der Dampfer sei besonders breit, verhältnissmässig niedrig und in Boden anscheinend fast flach gewesen, er würde auch beim Sturm im Hafen haben stehen können. Auch der Sachverständige Schiffsbautechniker Ihlder erklärt, das Auffüllen der Tanks sei wegen der Bauart des Dampfers nicht nothwendig gewesen, er habe ohne Ballast stehen können, wie sich auch daraus ergebe, dass im Abgangshafen

tained in the bill of lading (all the dangers and accidents of the seas and navigation excepted). In this view the appellate Court still concurs. The defendants naturally contend, that at least in the present case the burden of proof ought to be reversed and the plaintiffs be required to exculpate themselves, because the captain made it impossible for the ship inspectors to ascertain definitely the cause of the damage, and it is asserted, purposely so, in that, after finishing the discharge, he quickly left port.

Whether this contention be true as a matter of fact, or whether the defendants can rely on Articles 609 and 610 of the German Commercial Code as an authority for the existence of an obligation on the master to lend assistance in the ascertainment of the *cause* of the damage, and whether the preventing of, or throwing obstacles in the way of, an inspection, on the part of the master, would bring about a shifting of the burden of proof, need not however be discussed here, because from the testimony, the cause of the damage is disclosed to this extent, that a fault on the part of the crew must be assumed.

If, however, the defendants reproach the master for the mere fact, that he started in to fill the water tanks before the completion of the discharge, and when they assert that this step was only intended for and could only serve the following voyage, and that it had no connection with the voyage in question, then that is not correct. Capt. White asserts that he had the tanks filled both in the interest of the vessel, that is, to secure her stability during the continued discharge, and in the interest of a safe discharge of the cargo.

It is a fact that the weaving of the rice bags—which is proved by the report of the ship inspector—was thin and dried out, and the existing danger of the bags bursting was increased the higher the ship rose in the water, during the continued discharge, and in consequence thereof, the steeper the skid grew, on which the bags were allowed to slide down into lighters from the vessel.

The Bremerhaven ship inspectors Heincks and Ihlder, and the witness Koeper, are unwilling to admit unqualifiedly the correctness of this contention of the captain. Witness Koeper who, being an ex-ship captain, must be given credit for a certain amount of expert knowledge, says, that the nature of the construction of the vessel, did by no means make it necessary

Saigon die Tanks nicht gefüllt gewesen seien. Ebenso wollen Ihlber und Köper auch nicht anerkennen, dass durch das Auffüllen der Tanks das Löschen der Ladung gefördert sei. Köper meint, um die Steilheit der Steige abzustellen, sei es gebräuchlich, mit Fortschreiten der Entlöschung die Leichter weiter vom Schiff abzulegen, und Köper wie Ihlder erklären, wenn der Capitain zur besseren Entlöschung das Schiff habe tiefer in's Wasser bringen wollen, so hätte er nicht die hinteren sondern die vorderen Tanks füllen lassen müssen,—und das sei, wie sie im Gegensatz zum Capitain behaupten, nicht geschehen. Köper und Ihlder kommen danach zu der Ueberzeugung, dass das Auffüllen der Wassertanks mit der Herreise in keinen Zusammenhang gestanden habe, sondern lediglich für die nächste Reise geschehen sei. Weniger ungünstig wird die Handlungsweise des Capitains von dem Sachverständigen Schiffs und Ladungsbesichtiger Heincks beurtheilt. Auch er glaubt zwar, dass das Schiff, da es seine grösste Breite unten hatte ohne Ballast habe stehen können, auch meint er, dass das Auffüllen zur Sicherung einer gefahrloseren Löschung nicht grade nothwendig gewesen zei, da man die Ladung, wenn die Stege zu steil seien, auch durch Strotten (Schlingen) aus dem Schiff habe entfernen können. Allein an sich sei es wohl zweckmässig, wenn der Capitain, um die Gefahr des Platzens der Säcke zu vermindern das Schiff durch Wasserballast tiefer gelegt habe; das sei auch während des Löschens gebräuchlich, man fülle die Tanks dann vorn und hinden gleichmässig auf, damit das Schiff sich gleichmässig senke. Wenn das Auffüllen der Tanks vor beendigter Löschung auch vielleicht nicht nothwendig gewesen sei, so sei es doch ordnungsmässig. Auch habe der Capitain sich darauf verlassen dürfen, dass die vor dem Antritt der Reise gedichteten Tanks noch Wasserdicht seien. Und ähnlich spricht sich auch der Sachverständige Woegens aus. Er verneint freilich, dass die fragliche Massregel für das Löschen der Ladung zweckmässig sei, und nimmt daher nicht an, dass der Capitain sie aus diesem Grunde vorgenommen habe. Dagegen erklärt er das Auffüllen der Wassertanks während des Löschens im Interesse der Stabilität des Schiffs keineswegs für ordnungswidrig, er bezeugt, dass jene Massregel vorsichtshalber auch anderweitig in Gebrauch sei, und giebt sein Gutachten dahin ab, dass dem Capitan kein Vorwurf treffe, wenn er sie,

to take in water ballast, as the steamer was particularly wide, relatively speaking, low, and the bottom apparently flat, and it could have been able to weather a storm in the harbor. And the expert vessel constructor, Ihlder, maintains that the filling of the tanks was not rendered necessary by the nature of the construction of the vessel, that it could have lain there without ballast; which is proved by the fact, that the tanks were not filled at Saigon, the port of departure. Neither do Ihlder and Koeper wish to admit, that by reason of the filling of the tanks, the discharge of the cargo was facilitated. Koeper claims that to remedy the steepness of the skid, it was customary, to place the lighters further from the vessel as the discharge progresses; and Koeper and Ihlder state, that if the captain, for the purpose of facilitating the discharge, had desired to give the vessel a deeper draught, he ought not to have had the rear tanks filled, but the forward ones, and this was not done, as they insist, in contradiction of the captain's contention. From this fact, Koeper and Ihlder are of the opinion that the filling of the water tanks had no connection with the home voyage, but was done solely in the interest of the next voyage. The actions of the captain are judged less unfavorably by the expert vessel and cargo inspector Heincks. Even he believes, that the vessel could have lain without ballast, owing to the fact, that its greatest width was at the bottom, and he also thinks, that the filling was not altogether necessary to insure a safe discharge, as the cargo could have been removed from the vessel, with slings, in case the skid was too steep. However, if the captain, to reduce the danger of the bags bursting, gave the vessel a deeper draught by means of water ballast, it was certainly expedient and the customary mode during the discharge, that then the tanks are filled evenly forward and aft, to insure an equal lowering. Even if the filling of the tanks before completing the discharge was not necessary, it was nevertheless proper. The captain was justified in supposing, that the tanks which were made tight before the voyage was entered upon, were still tight.

In a similiar manner the expert, Woegens, also expresses himself. He denies, as a matter of fact, that the act in question was necessary for the discharge of the cargo, and for that reason does not assume, that the captain resorted to it for

obwohl sie nicht geboten gewesen sei, zu mehrerer Sicherheit angeordnet habe. Nach diesen überzeugenden gutachtlichen Aeusserungen der Sachverständigen Heincks und Woegens ist jedenfalls soviel ausser Zweifel, dass das Auffüllen der Tanks zu einer Zeit, wo das Schiff noch im Löschen begriffen ist, an und für sich ebensowohl im Interesse der Stabilität des Schiffes und im Interesse der Löscharbeiten, mithin für die Zwecke der gegenwärtigen Reise geschehen sein kann, als für die demnächstige, so dass also keineswegs davon als von der Regel auszugehen ist, dass jene Massregel mit Rücksicht auf die neue Reise erfolge. Schon hiernach wird man garnicht davon reden können, dass in dem Auffüllen der Tanks während der Löscharbeiten an und für sich ein schuldhaftes Verhalten des Schiffers zu befinden sei. Es kommt aber hinzu, dass für den gegenwärtigen Fall die Behauptung des Capitains White, er habe den Wasserballast im Interesse des Schiffes und der Löscharbeiten, also für Zwecke der Herreise eingenommen, nach dem Gutachten der Sachverständigen keineswegs als widerlegt anzusehen ist. Ob die Auffüllung der Tanks auch der Löschung dienlich war, mag dahingestellt bleiben, da die Angaben des Capitains einerseits und Ihlders und Köpers andrerseits darüber auseinandergehen, ob auch die vorderen Tanks gefüllt worden sind. Jedenfalls war die Einnahme des Wasserballastes für die Stabilität des Schiffes, wie Heinck und Woegens bezeugen, wenn auch nicht nothwendig doch zu aller Vorsicht eine verständige Massnahme, es liegt daher kein Grund vor, der Behauptung des Capitains, dass ihn solche Rücksichten geleitet haben, zu misstrauen. Dass der Capitain damals gegenwärtigen Bedürfnissen hat entsprechen und nicht ausschliesslich Vorbereitungen für die demnächstige Reise hat treffen wollen, dafür spricht auch, dass das hier fragliche Auffüllen bereits am 9 Juni, also fünf Tage vor seiner am 14. erfolgten Abreise, ausgeführt worden ist.

Hiernach ist dem Capitain daraus, dass er zu jener Zeit die Tanks ausfüllen liess, an sich ein Vorwurf nicht zu machen, es war das keine ordnungswidrige Procedur. Es ist aber als bewiesen anzusehen, dass, sei es dem Capitain, sei es einer andern Person der Schiffsbesatzung, anderweitig ein schuldhaftes Verhalten bezüglish der behandlung der Wassertanks zur Last fällt, durch welches jene Massregel schadenbringend geworden ist.

the alleged purpose. On the other hand he holds that the filling of the water tanks during the discharge in the interest of the stability of the vessel, is not irregular; he testified, that this step is a matter of precaution and is in use elsewhere; and gives his opinion to the effect, that the captain is not liable to reproach, if he ordered it to be done for the sake of additional safety, although not absolutely necesssary.

In view of these convincing statements of opinions of experts Heinck and Woegens this much is beyond a doubt, that the filling of the tanks at a time when the vessel was still discharging, could of itself have been done just as much in the interest of the stability of the vessel and the interest of the work of discharging, and therefore in the interest of the present voyage, as of the following voyage; and therefore it must not be assumed at the outset that this step was taken with reference to the new voyage. For this reason alone, it cannot possibly be said that in the filling of the tanks during the discharge can of itself be found negligent conduct on the part of the master. But to this must be added that for the present case the assertion of Captain White that he took in water ballast in the interest of the vessel and the discharge, that is to say, for the purposes of the home voyage, is not to be regarded as disproved by the expert testimony. Whether or not the filling of the tanks aided the discharge may be left undecided, as the statements by the captain on the one hand, and of Ihlder and Koeper on the other, differ as to whether the forward tanks had also been filled. At all events, the taking in of water ballast, for the purpose of preserving the stability of the vessel, as is testified to by Heinck and Woegens, even if not necessary, was certainly a sensible and precautionary step, and there is therefore no cause for doubting the statement of the captain, that such reasons prompted him to do it.

That the captain was then desirous of providing for present needs, and had not sought to prepare exclusively for the next voyage, is shown by the fact that the filling here in question was done on June 9th, five days before the vessel's leaving port, which was on the 14th.

It therefore follows, that no fault is to be found with the captain for filling the tanks at the time he did, which was not an improper procedure. It must, however, be deemed proven

Nach der Beweisaufnahme, besonders nach dem Woegens-'schen Gutachten kommen als Ursachen für die Wasseransammlung in dem unteren Laderaum vier Möglichkeiten in Betracht. Wenn das Wasser aus den Ballasttanks herrührt, so wäre es an sich möglish, 1. dass der Tank leckgesprungen, oder 2. dass die Peil- oder Luftröhren geplatzt oder abgebrochen, oder 3. dass das Mannloch nicht geschlossen oder nicht gehörig gedichted gewesen ist. An sich wäre auch, 4. denkbar, dass, wie der Capitain meint, Wasser aus dem im Maschinenraum befindlichen Kessel durch das in Folge Einklemmens eines Fremdkörpers aufgesperrte selbstthätige Ventil in den Laderaum eingedrungen wäre. Die beiden ersterwähnten Möglichkeiten müssen jedoch im gegenwärtigen Falle als ausgeschlossen angesehen werden. Nach Woegens und Ihlders Meinung spricht dagegen schon die erhebliche Menge des ausgeströmten Wassers. Entscheidend aber ist, dass es sich in diesem Falle um einen Schaden an dem Tank gehandelt haben würde, der nur durch eine Reparatur hätte gehoben werden können. Wäre solche erfolgt, so hätte Capitain White davon sofort oder doch jedenfalls später Kentniss erhalten haben müssen (Woegens); es muss also nach der Aussage des Capitains, der davon nichts angegeben hat, angenommen werden, dass eine Reparatur in der That nicht stattgefunden hat. Dass der Capitain in dieser Beziehung bei seiner Vernehmung etwas verschwiegen haben sollte, ist um so weniger wahrscheinlich, als ein solcher Schaden des Tanks keineswegs auf einem von der Rhederei zu vertretenden Verschulden zu beruhen brauchte, diese Schadensursache vielmehr eher eine Exculpirung der Klägerin begründet haben könnte. Eine Reparatur an dem Tank würde aber auch längere Zeit erfordert haben, sie kann daher nicht erfolgt sein, da der Capitain, wie er bezeugt, nach Beendigung der Löschung und vor seiner in der Mittagsstunde desselben Tages erfolgten Abreise den Tank von Neuem hat auffüllen lassen. Ebenso aber ist es unwahrscheinlich, dass das Wasser aus dem vom Capitain bezeichneten Ventil, also aus dem Kessel, herstammt. Woegens erklärt, nicht annehmen zu können. das eine solche Wassermasse aus dem Machinenraum gekommen sei. Übrigens wäre doch Voraussetzung, dass gerade damals zur selben Zeit als der Tank aufgefüllt wurde, der Capitain oder der Ingenieur das Ablassen des Wassers aus dem Kessel angeordnet hatte; davon aber ist bisher keine

that, be it either on the part of the captain or on the part of some other member of the ship's crew, fault must be charged against some one in reference to the working of the water tanks, which caused the aforesaid filling to cause damage.

From the testimony taken, and especially from the opinion rendered by Woegens, it appears that four possible causes must be considered in determining the reason for the gathering of water in the lower cargo space. If the water had its origin in the ballast tanks, it would be possible, 1, that the tank sprung a leak ; 2, that the sounding tube or air pipe had burst, or been broken off ; or 3, that the manhole was not closed, or was not properly made tight.

Again it is also possible, 4, that, as the captain supposes, the water came out of the boiler in the engine-room and ran into the cargo space in consequence of some foreign substance being jammed in the automatic valve. The first two mentioned possibilities must, however, be looked upon as excluded in the case at bar. According to Woegen's and Ihlder's opinion, the large quantity of the water which ran out is opposed to them. It is certain, however, that there must have been a damage to the tank in this case of a nature which could only have been removed by being repaired. If repairs had been made, Capt. White would have received information concerning them, either immediately or at least a little later (Woegens); from the testimony of the captain, who said nothing, it must be assumed that, as a matter of fact, no repairs were made.

That the captain, in this regard, should have withheld something on his examination is all the less probable, as such a damage to the tank would not need to be based on a default, for which the shipowner was liable ; on the contrary, this cause of damage would much rather tend to exculpate the plaintiff. A repair of the tank would probably have required considerable time, and could therefore not have been made, as the captain testifies that he had the tank filled anew after completing the discharge, and before leaving port on a new voyage, at noon of that day. It is just as improbable that the water came from the valve designated by the captain or from the boiler. Woegens claims that it could not be inferred that such a quantity of water came from the engine room. Besides, it might also be supposed that just at the

Rede gewesen, auch der Capitain hat dies nicht gesagt, und es ist auch unter den Parteien bisher gar kein Zweifel gewesen, dass der Wassershaden mit dem Auffüllen der Tanks in ursächlichem Zusammenhang stehe. Nach Ihlder's Meinung ist dies auch die Ueberzeugung des Steuermanns gewesen, da dieser, als ihm Ihlder aufgab, für die Untersuchung die hölzerne Bekleidung der Tanks abzunehmen, eine Grimasse machte, die Ihlder dahin deutete der Steuermann wisse, woher das Wasser komme und man werde nun nichts mehr finden.—Dass das Wasser nicht aus dem Maschinenraum herstammen könne, weil es dann durch die Vermischung mit dem Bilgenwasser weit schmutziger gewesen sein würde, wird vom Zeugen Koeper behauptet und vom Sachverständigen Woegens dahin bestätigt, dass allerdings das Bilgenwasser immer Reste von Kohlen, öl und Twist mit sich führe, die an der von ihm durchnässten Ladung sichtbar werden würden. Obwohl nun wenig wahrscheinlich ist, dass in dieser Beziehung bei Koepers Beobachtungen ein Irrthum untergelaufen sein könnte, so muss doch dies an sich ohne Zweifel bedeutende Beweismoment ausser Beachtung bleiben, da der von der Klägerin durch Benennung von fünf Zeugen angebotene gegenseitige Beweis, dass nämlich das fragliche Wasser schmutzig, also kein reines Hafenwasser gewesen sei, nicht erhoben ist. Es bedarf aber auch einer Feststellung dieses Punktes nicht, weil schon nach dem vorher Ausgeführten nicht anzunehmen ist, dass das Wasser aus dem Maschinenraum stammt.

Es bleibt sonach nur die Möglichkeit, dass das Wasser aus dem Mannloch ausgeströmt ist, mag dieses nun überkaupt nicht verschlossen oder nicht gehörig gedichtet gewesen sein. Bei dieser Annahme erklärt sich auch einerseits, dass das Wasser in grosser Menge ausströmen könnte und andrerseits, dass der Mangel, nachdem das Wasser ausgepumpt war, sofort entdeckt und schnell und ohne Reparatur abgestellt werden konnte. Das konnte in der einfachsten Weise geschehen, ohne dass der Capitain davon Kenntniss erhielt. Es ist sehr wohl denkbar, dass, nachdem der unzureichende Verschluss des Mannlochs entdeckt war, dies sofort gedichtet worden ist und dass man dem Capitain, um dessen Vorwürfen zu entgehen, davon keine Mittheilung gemacht hat. Es steht also der Annahme, dass das Wasser dem Mannloch entströmt ist, nicht

time when the tank was being filled, the captain or the engineer had ordered the discharge of water from the boiler; again, up to the present time there has been no mention of this fact, the captain himself did not say it, and as between the parties there has been no doubt heretofore that the water damage stood in a casual relation to the filling of the tanks. According to the opinion of Ihlder, this was also the conviction of the mate, as he, when instructed by Ihlder to remove the wooden coating of the tanks, made a grimace, which Ihlder construed to mean that the mate knew whence the water came, and that nothing more would be found. The fact the water could not have come from the engine-room, as then being mixed with bilge water, it would have been much dirtier, is asserted by witness Koeper, and is in so far concurred in by expert Woegens, that the bilge water always contains coal dust, oil and twist, which would have been obvious from the cargo thereby saturated. Although it is unlikely that in this respect there was a mistake made in Koeper's observations, this particularly matter of proof may be disregarded because the testimony of the five witnesses named by the plaintiff to prove in rebuttal that the water in question was dirty, and there was no clean harbor water, was not offered. It does not require a decision on this point, because it cannot be inferred from the previous reasoning, that the water came from the engine-room.

Therefore the only possibility which remains is that the water came from the manhole, it being immaterial whether it was not closed at all, or not sufficiently made tight. This finding explains on the one hand, why the water could come in great quantities, and on the other hand, why the defect, after the water was pumped out, was immediately discovered and remedied quickly and without repairs. This could be done in the simplest manner, and without the captain's learning it. It is very probable, that after the insufficient fastening of the manhole was discovered, it was immediately made tight, and that no mention of it was made to the captain, to escape his reprimands. The inference that the water came from the manhole is not at all opposed to the assertion of Capt. White, that he, after the cargo was discharged, together with the cargo inspectors (that is to say, with persons, whom he supposed to be such), examined the manhole and found it closed and in-

entgegen die Aussage des Capitains White, er habe, nachdem die Ladung gelöscht gewesen sei, mit den Ladungsbesichtigern (d. h. mit Leuten, die er für solche gehalten habe) das Mannloch untersucht und es geschlossen und intact befunden ; dann sei auf Veranlassung jener Herren der Tank noch einmal aufgefüllt und es habe sich ergeben, dass das Mannloch dicht sei.

Der unzureichende Verschluss des Mannlochs aber beruht, wie auch der Sachverständige Woegens bestätigt, unter allen Umständen auf einer Nachlässigkeit der Schiffsbesatzung, für die die Rhederei aufzukommen hat.

Das R. G. verwarf am 23. Januar 1895 die Revision der Klägerin.

AUS DEN GRÜNDEN :

Wenn die Revision geltend macht, dass zu der "Ablieferung" der Güter, wegen deren auf die Chartepartie Bezug genommen ist, nicht allein der für die Ablieferung bestimmte Hafen, sondern auch die Art und Weise der Ablieferung gehöre, so mag dies im Allgemeinen zugegeben werden. Unzutreffend ist aber die weitere Folgerung, dass unter der Art und Weise der Ablieferung der Güter auch der Umfang der Haftung des Verfrachters für deren Verlust oder Beschädigung zu verstehen sei. Ebenso unerheblich ist der Hinweis der Revision auf den Umstande, dass zu den Connossementen gedruckte Formulare benutzt seien, bei welchen die hinzuzufügenden Worte von der Stellung und Grösse der freigelassenen Lücken abhängig gewesen seien. Denn die Rechtsfolgen der Verwendung von Connossements-Formularen, welche nicht geeignet sind, den Willen des Ausstellers durch ihre Ausfüllung im vorliegenden Falle klar zum Ausdrucke zu bringen, können nicht den Empfänger, sondern nur den Verfrachter treffen. Uebrigens zeigt das beigebrachte Original-Connossement ganz deutlich, dass das Formular genügenden Platz geboten hätte, die in englischen Connossementen sonst sehr übliche Clausel "all other conditions as per charterparty" einzurücken. Dass eine solche allgemeine Bezugnahme im vorliegenden Falle unterblieben ist, spricht gerade gegen die Klägerin. In welchem Sinne die zunächst betheiligten englischen Befrachter und Ablader die an ihre Order aus-

tact; and that then at the request of those gentlemen, the tanks were again filled, and it then appeared, that the manhole was tight.

The insufficient shutting of the manhole, as is confirmed by the expert Woegens, in all circumstances arose from the negligence of the ship's crew, for which the shipowners are liable.

The Imperial Court dismissed the appeal of the plaintiff on January 23d, 1895,

On the following grounds:

The contention of the appellant, that to the "delivery" of the goods, on behalf of which reference is made to the charter-party, belongs not only the port, designated for the delivery, but also the *manner* of delivery, can ordinarily be conceded.

Not to the point, however, is the further contention, that by "*the manner of the delivery* of the goods is to be understood also the extent of the *liability* of the owner for loss or damage. Just as irrelevant is the reference of the appellants to the circumstance that printed blanks are used for the bills of lading, in which the words to be added depend on the place and size of open spaces. For the legal consequences from using bills of lading blanks, which are not adapted to express clearly in the case at bar the intention of the maker cannot affect the shipper, but only the shipowner. Moreover the original bill of lading, which was provided, shows very clearly that the blank offered sufficient space, to insert the clause which is usually contained in English bills of lading: "All other conditions as per charter-party." The mere fact that such a general reference was omitted in the case at bar, speaks directly against the plaintiff. Which interpretation the persons primarily interested, the English consignor and consignee, may have given to the bills of lading made out to their order, is also irrelevant, because the defendant firm, in acquiring the bills of lading were justified in giving to them an interpretation which was usual according to the German language and law.

While the lower Court assumes from this, without violating legal maxims, that to determine the legal relations between the parties, only the bill of lading clause should be considered, according to which the plaintiff has stipulated against its

gestellten Connossemente verstanden haben mögen, ist ebenfalls unerheblich, da die Beklagte bei der Erwerbung der Connossemente berechtigt war, dieselben in dem Sinne auszulegen, welcher ihnen nach deutschem Rechte und Sprachgebrauch beizulegen ist.

Indem das Berufungsgericht hiernach ohne Verletzung von Rechtsnormen annimmt, dass für das Rechtsverhältniss zwischen den Parteien nur die Connossementsclausel in Betracht komme, nach welcher die Klägerin sich freigezeichnet hat von "allen Dangers and Accidents of the Seas and Navigation of whatever nature and kind" bejaht es aus zutreffenden Gründen (und übrigens auch zu Gunsten der Klägerin) die zwischen den Parteien weiter streitige Frage, ob der im vorliegenden Falle sich erst im Abladehafen ereignende schadenbringende Unfall, das Eindringen von Wasser in den Schiffsraum bei Füllen der Tanks, als ein accident of navigation zu gelten habe. Es nimmt aber—und zwar ebenfalls mit Recht—an, dass hiermit die Nichthaftung der Klägerin noch nicht entschieden sei, da diese nur unter der Voraussetzung eintrete, dass der Unfall ohne Verschulden der Rhederei und der Schiffsbesatzung entstanden ist, indem eine derartige Clausel lediglich eine Umkehrung der Beweislast dahin bewirke, dass, während sonst der Verfrachter das Vorliegen höherer Gewalt nachzuweisen haben würde, jetzt der Befrachter oder Empfänger ein Verschulden der Gegenseite zu behaupten und nachzuweisen habe.

Ein solches Verschulden hat nun die Beklagte in verschiedenen Richtungen behauptet und das Berufungsgericht hat nach mehrfachen Beweiserhebungen durch Vernehmung von Zeugen und Sachverständigen die Ursache des Schadens für soweit aufgeklärt erachtet, dass ein Verschulden der Besatzung des Schiffes angenommen werden müsse.*

* * * * * * *

Das Berufungsgericht führt aus, es sei sehr wohl denkbar dass, nachdem der unzureichende Verschluss des Mannloches entdeckt war, dieses sofort gedichtet wurde und dass man dem Capitain, um dessen Vorwürfen zu entgehen, davon keine Mittheilung machte; der Annahme, dass das Wasser dem Mannloch entströmt sei, stehe also die Zeugenaussage des Capitains

* The same omission is in the original.

liabllity, from "all dangers and accidents of the seas and navigation of whatever nature and kind" it answers in the affirmative, and on pertinent grounds (and moreover also in favor of the plaintiff), the additional question in dispute between the parties, whether or not in the case at bar, the accident which caused the damage and which happened in the port of discharge, to wit, the entering of water into the hold of the vessel, while filling the tanks, is to be considered an accident of navigation. But it assumes, and moreover justly so, that this does not yet decide the non-liability of the plaintiff, because the latter only occurs on the presumption, that the accident happened without the fault of the shipowner, or the ship's crew, inasmuch as such a clause of itself brings about a shifting of the burden of proof to this extent, that, while ordinarily the owner would have to prove the existence of *vis major*, it is now the consignor or consignee who must allege and prove a fault on the part of the other side.

Such a fault the defendant firm has alleged in various directions, and the lower Court, after repeatedly taking proofs by hearing witnesses and experts, has considered the cause of the damage in so far established, that fault on the part of the crew of the vessel must be inferred.

The lower Court argues, that it is very probable that, after the insufficient fastening of the manhole was discovered, it was immediately made tight, and that to avoid the reproaches of the Captain, no report was made to him about it; the assumption, that the water ran from the manhole, is not in conflict with the testimony of Capt. White, which is to the effect that he, after the cargo was discharged, inspected the manhole with the cargo inspectors (that is to say, with the persons which he took to be such) and found it locked and intact, and that then, at the suggestion of those gentlemen, he had the tank filled again, and it was hereby shown that the manhole was tight.

This is a finding of fact, to make which the Court below was absolutely justified under § 259 of the Civil Procedure Act, which authorizes and makes it the duty of the Court to freely weigh the proofs, and this finding is binding on the appellate Court, in so far as it is not shown, that it was influenced by error in procedure. This is, however, not the case, and in particular the exceptions taken thereto by the

White nicht entgegen, dass er, nachdem die Ladung gelöscht gewesen sei, mit den Ladungsbesichtigern (d. h. mit den Leuten, welche er für solche gehalten habe) das Manhloch untersucht und es geschlossen und intact befunden habe, und dass dann auf Veranlassung jener Herren der Tank noch einmal aufgefüllt und sich dabei ergeben habe, dass das Mannloch dicht war.

Dies ist eine thatsächliche Feststellung, zu welcher das Berufungsgericht vermöge der ihm nach § 259. der C. P. O. zustehende und obliegenden freien Beweiswürdigung durchaus berechtigt war, und welche für das Revisionsgericht bindend ist, sofern dieselbe sich nicht als durch processuale Verstösse beeinflusst erweisen sollte. Das ist aber nicht erfindlich und insbesondere erscheinen auch die dieserhalb von der Revision erhobenen Rügen nicht als gerechtfertigt. Weshalb das Berufungsgericht es nicht dahingestellt lassen durfte, ob das Mannloch überhaupt nicht geschlossen oder nur nicht gehörig gedichtet war, ist nicht einzusehen, wenn nur—wie das Berufungsgericht mit dem Sachverständigen Woegens ohne rechtsgrundsätzlichen Verstoss annimmt auch schon der unzureichende Verschluss des Mannlochs unter allen Umständen auf eine Nachlässigkeit der Schiffsbesatzung zurückzuführen ist, für welche die Rhederei aufzukommen hat. Ebensowenig ist die Rüge begründet, dass die blosse Denkbarkeit einer inzwischen hinter dem Rücken des Capitains hergestellten Dichtung des unzureichenden Verschlusses des Mannloches keine genügende Unterlage für eine thatsächliche Feststellung sei, was namentlich im vorliegeuden Falle gilt, wo es sich lediglich um die Würdigung eines aus einer ganzen Kette von Beweis und Gegenbeweis-Gründen in Betracht kommenden Umstandes handelt. Endlich war das Berufungsgericht an seiner thatsächlichen Feststellung auch dadurch nicht behindert, dass der Sachverständige Woegens selbst nur erklärt hatte, vielleicht sei nur des Mannloch des Tanks nicht geschlossen oder nicht genügend gedichtet gewesen. Denn die Sachverständigen dienen dem Richter nur als Gehülfen zur Erforschung der Wahrheit oder Nichtwahrheit streitiger Thatsachen und der Richter ist an ihr Gutachten bei seiner thatsächlichen Würdigung keineswegs gebunden."

Hanseatische Gerichtszeitung, 1895, Part I., p. 85.

appellant are not sustained. It is not apparent why the Court below did not ignore the point, whether the manhole was not fastened at all, or merely not made properly tight, provided —as the Court below and also the expert Woegens infers— without infringing on legal principles—that the insufficient closing of the manhole could, in all circumstances, be traced to negligence of the ship's crew, for which the owner is liable.

The exception is also unfounded, that the mere probability of the making tight of the insufficient closing of the manhole, behind the back of the master, is no sufficient basis for a finding of fact, which is especially important in the case at bar, where it is merely a question of weighing one circumstance arising for consideration, in a whole chain of evidence *pro* and *contra*. And finally the Court below was not hampered in making its findings of fact, because the expert Woegens had only declared, that *probably* the manhole of the tank was not closed, or not made sufficiently tight. For the experts merely serve the purpose of aiding the Judge in ascertaining the truth or untruth of disputed facts, and the Judge in his appreciation of facts is in no way bound by their opinion.

§26. Verantwortlichkeit des Verfrachters bei der Connossements-Clausel: "Frei von Beschädigung." Haftung für Schaden durch Bruch des Füllrohres eines Tanks.

Apenrader-Actien-Brauerei-Gesellschaft in Apenrade gegen die deutsche Dampfschiffs-Rhederei in Hamburg.

Das O. L. G. I, erkannte am 30. Januar, 1892, dass der Anspruch der Klägerin wegen Beschädigung von 99 Kisten Export-bier, welche mit dem beklagtischen Dampfschiff *Bellona* im October, 1887, von Hamburg nach Hiogo von der Klägerin verladen sind, dem Grunde nach berechtigt sei.

ENTSCHEIDUNGSGRÜNDE.

Die hier in Betracht kommende Befreiungs-Clausel des vom Schiffer der *Bellona* gezeichneten Connossements lauted: "Höhere Gewalt, des Kaisers oder des Reiches Feinde, Piraten, See- oder Landräuber, Zwang durch Fürsten, Regenten oder Völker, Wurmfrass, Regen, Spritzwasser, ungenügende Verpackung, oder gewöhnliche Abnutzung oder Zerreissen der Emballage, Ungenauigkeiten, Auslöschungen oder Fehler der Marken, Nummern, Addresse oder Beschreibung der verladenen Waaren, Leckage, Bruch, Rost, innerer Verderb, Verlust oder Schaden durch Kohlenstaub während der Reise, Verlust oder Schaden durch die Maschine, Kessel oder durch Dampf, wie auch immer verursacht, oder durch Collision, Strandung oder Wrackwerden, wie auch immer verursacht, oder durch Explosion, Hitze oder Feuer an Bord, im Lagerschiff oder sonstigen Fahrzeug, oder am Lande, wie auch immer verursacht, oder durch Ausdünstung oder Geruch von anderen Gütern, über Bordwerfen, Baratterie, Vergehen, irrthümliche Auffassung, Nachlässigkeit oder Fehler des Lootzen, Capitains, der Seeleute, der Maschinisten, oder anderen Personen im Dienste des Schiffes, gleichviel, ob in der Navigation des Schiffes oder sonstwie, Risiko des Lagerschiffes, Leichter und sonstiger Fahrzeuge, Umladung and Beförderung in anderen Schiffen, und alle und jede andere Gefahr oder Zufälle der See, des Landes, von Kanälen oder Flüssen und der Schiffahrt, von welcher Natur oder Art sie auch sein mögen, sind ausgenom men, und ist das Schiff weder Verantwortlich für irgend welche Folgen von allen ausgenommenen Ursachen wie sie auch entstanden sein mögen, noch ist das Schiff verantwortlich für

§ 26. Liability of the shipowner under the bill of lading clause, "Free from injury." Liability for damage caused by breaking of a feed pipe of a tank.

Apenrader Stock Brewing Co. in Apenrade
vs.
The German Steamship Owners Company in Hamburg.

Upper Land Court, Part I, held on Jan. 30th, 1892, that the demand of the plaintiff for damage to 99 cases of export beer, which were shipped by plaintiff on the defendant's steamship *Bellona* in October, 1887, from Hamburg to Hiogo, was justified.

GROUNDS OF DECISION.

The exemption clause, here to be considered, contained in the bill of lading signed by the master of the *Bellona*, read that "*vis wajor*, the Emperor's or the Empire's enemies, pirates, sea or land robbers, restraint of princes, rulers or people, vermin, rain, spray, insufficient package, or unusual wear and tear of packages, incorrectness, insufficiency or absence of marks, numbers, addresses or description of the goods shipped, leakage, breakage, rust, internal decay, loss or damage by coal dust, during the voyage, loss or damage by the engine, boiler or by steam, howsoever caused, or by collision, stranding and becoming a wreck howsoever occasioned, or by explosion, heat or fire on board, in craft or other vessel, or on shore, however occasioned, or by evaporation or smell of other goods, jettison, barratry, fault, error in judgment, negligence or default of the pilot, master, mariners or engineers or other persons in the service of the vessel, whether in navigating the vessel or otherwise, risk of craft, lighter, or other vessel, trans-shipment and forwarding in other vessels and all and every other perils or accidents of the seas, land, canals or rivers, and of navigation, of whatever kind or nature they may be, are excepted, and the ship is neither responsible for any consequences, of any

incorrecte Ablieferung, es sei denn, dass jedes Collo von dem Verschiffer vor der Verladung deutlich mit dem Namen des Bestimmungshafens in mindestens zwei Zoll langen Buchstaben bezeichnet worden."

Das L. G. beurtheilt die Tragweite dieser Clausel nicht richtig, wenn es ihr eine weitergehende Bedeutung beigelegt wissen will, als der allgemein lautenden Clausel "frei von Beschädigung." Richtig ist nur, dass im Fall der Zeichnung des Connossements mit der Clausel "frei von Beschädigung" der Verfrachter für Beschädigung nur haftet bis zu dem gegen ihn zu führenden Beweise des Verschuldens des Schiffers oder einer sonst von dem Verfrachter zu vertretenden Person, während nach der Befreiungs-Clausel des Connossements der *Bellona* deren Rhederei auch die Haftung für Vergehen irrthümliche Auffassung, Nachlässigkeit oder Fehler des Lootsen, Capitains, der Seeleute, der Maschinisten oder anderer Personen im Dienste des Schiffes, gleichviel in der Navigation oder sonstwie, ablehnt. Insoweit also der Befrachter seinen Schadensanspruch wegen Beschädigung seiner Güter nur aus Verschulden einer Person der Schiffsbesatzung zu gründen in der Lage ist, steht er allerdings nach dem Connossement der *Bellona* schlecter als nach einem einfach "frei von Beschädigung" gezeichneton Connossement. Andererseits ist aber seine Stellung, wenn dass Connossement nicht allgemein "frei von Beschädigung" gezeichnet ist, insofern wiederum eine günstigere, als er von dem an sich exculpationspflichtigen Verfrachter die Darlegung erwarten darf, dass die geschehene Beschädigung der Güter auf eins der Vorkommnisse zurückzuführen, für deren Folgen in der Befreiungsclausel des Connossements die Haftung ausgeschlossen ist. Die Beklagte hat sich darauf beschränkt, sich im Allgemeinen auf die vorstehend ausgeschriebene Connossementsclausel zu berufen. Es ist aber nicht erfindlich, welche Bestimmung mit Klaren Worten die Haftung für eine Beschädigung ausschliessen sollte, die, wie im vorliegenden Fall, dadurch entstanden, dass das vom Maschinenraum durch den Laderaum nach dem hinteren Peak-Tank führende Rohr gebrochen und in Folge dessen Wasser in den Laderaum eingedrungen ist. Während beispielsweise nach Regel II. der seinerzeit von den Handelskammern von Hamburg und Bremen empfohlenen allgemeinen Regeln für Dampfer-Connossements, wie notorisch, der Rheder nicht verant-

of the excepted causes, however they may have arisen, nor is the vessel liable for incorrect delivery, provided that each bale, before its loading on board, shall have been plainly marked by the shipper with the name of the port of destination with letters at least two inches in length."

The Land Court did not judge the import of this clause correctly, if it sought to give a greater effect to this than to the common clause, "free from injury." It is only correct, that in the case of signing a bill of lading containing the clause, "free from injury," the ship-owner is only liable for such injury caused by the fault of the master or any other person, representing the owner, which the shipper must prove, whereas according to the exception clause contained in the *Bellona* bill of lading, her owner also excepts liability for fault, error in judgment, negligence and default of the pilot, master, mariners or engineers, or other persons in the service of the vessel, either in the navigation or otherwise.

In so far as the shipper is able to base his claim for indemnity for damage to his goods only on the fault of one of the ship's crew, he is certainly in a worse position with the bill of lading of the *Bellona* than with a bill of lading containing the ordinary "free from injury." On the other hand, if the bill of lading has not the general clause "free from injury," then his position is so far a more favorable one, because he has a right to require from the owner the proof, that he is free from fault, that the damage sustained by the goods can be traced to one of the causes, for the consequences of which the exceptions in the bill of lading exempt him from liability.

The defendant has confined itself to relying on the foregoing bill of lading clause. It is not evident, however, which part of it is intended in clear language to exclude the liability for injury, which, as in this case, arose in consequence of the breaking of a pipe leading from the engine room through the cargo space into the after peak tank, and causing water to enter into the cargo space. While, for example, as is well-known, the ship-owner is not responsible for the "bursting of the steam boilers or pipes," according to Rule II. of the general rules for steamship bills of lading, recommended at the time by the Chambers of Commerce of Hamburg and Bremen—among the specially enumerated possible causes of damage,

wortlich ist für " Platzen von Dampskesseln oder Rohrleitungen," findet sich unter den im Connossement der *Bellona* ausdrücklich aufgeführten einzelnen möglichen Schadensursachen, für welche die Haftung des Schiffes abgelehnt wird, keine, unter welche der Bruch einer Rohrleiting von dem Maschinenraum nach einem der Peaktanks zu bringen wäre. Die allgemeine "Äusserung am Schluss" alle und jede andere Gefahr oder Zufälle der See, des Landes, von Kanälen oder Flüssen und der Schifffahrt, von welcher Natu order Art sie auch sein mögen, sind ausgenommen," schützt die Beklagte nicht, denn der Bruch des Füllrohrs eines Tanks kann wohl, muss aber nicht nothwendig auf die Gefahren oder Zufälle der Seeschifffarth zurückzuführen sein. Es wäre jedenfalls Sache der Beklagten gewesen, nachzuweisen, dass die letztere Annahme für die in Hamburg angetretene Frachtreise der *Bellona* zwingend sei. An dieser für die beklagtische Berufung auf die Befreiungs Clausel unverlässlichen Voraussetzung fehlt es jedoch. Die Sache liegt deshalb für die Beurtheilung nicht anders, als sie liegen würde, wenn die Beklagte in Ermangelung irgend welcher Befreiungs-Clausel lediglich nach Massgabe H. G. B., Art. 607, wegen Beschädigung der eingenommenen klägerischen Güter sich zu exculpiren hätte. Dazu reicht aber auch hier der Hinweis auf die nackte Thatsache des Bruchs des Füllrohrs nicht aus, denn es liegt, wie schon erwähnt, nichts vor, was die Einwirkung höherer Gewalt, wie die Beklagte sie nachweisen soll, anzunehmen gestattete. Der Bruch ist constatirt am 8 November, 1887, noch auf der Elbe, während das Schiff bei Brockdorf Nebels wegen vor Anker lag und bei Gelegenheit der Füllung des hinteren Peaktanks. Seit seinen Abgang von Hamburg am 6 November hatte sich ausweise der Verklarung durchaus nichts Ungewöhnliches ereignet. Der Beklagten bleibt aber nach H. G. B., Art. 607 Abs. 2, die Möglichkeit sich, wie sie auch eventuell gethan, aus dem Gesichtspunk zu exculpiren, dass sie, den schadhaften Zustand des Füllrohrs schon vor Antritt der Reise der *Bellona* vorausgesetzt, geltend macht, es sei derselbe aller Sorgfalt ungeachtet nicht zu entdecken gewesen und deshalb die Beschädigung der klägerischen Güter einer durch höhere Gewalt veranlassten, also von ihr nicht zu verantwortenden gleichzuachten. Indessen auch in dieser Richtung ist der Exculpationsversuch der

contained in the bill of lading of the *Bellona*, for which the liability of the ship is absolved, none is found, which could cover the bursting of a pipe line from the engine room to one of the peak tanks.

The general statement at the end, to wit : "All and every other perils or accidents of the seas, land, canals or rivers and of navigation of whatever kind or nature they be, are excepted," does not protect the defendant. The bursting of the feed pipe of a tank can possibly be traced to the perils of navigation, but not necessarily so. Unquestionably it would be incumbent on defendant to show that an inference of sea perils can be applied to this freighting voyage of the *Bellona*, begun at Hamburg. This hypothesis, which would be indispensable to sustain the defendant's appeal, however fails. Hence, for the purpose of this decision, the master is in the same position as if the defendant had no exemption clauses ; and had to absolve itself for injury to goods received solely under Art. 607, of the Commercial Code.

For this purpose, the reference here to the bare fact of the bursting of the feed pipe, does not suffice. As already stated, there is no ground to infer an effect of *vis major*, which the defendant must prove. The break was discovered on November 8th, 1887, on the occasion of filling the after peak tanks while the ship was off Brockdorf on the Elbe, having anchored on account of fog. Since leaving Hamburg on November 6th, as the protest shows, nothing unusual had happened.

The defendant has remaining the possibility of freeing itself by Art. 607, § 2 of the Commercial Code ; and it did eventually take the view, that, assuming the defect in the feed pipe existed at the beginning of the voyage of the *Bellona*, it could not have been discovered in spite of all care ; that therefore the injury to plaintiff's goods is to be considered as due to *vis major* for which the defendant is not responsible.

But even here, the effort on the part of the defendant to exculpate itself has failed. The Appellate Land Court was convinced from the testimony before it, that the feed-pipe in question was not only defective at the inception of the voyage of the *Bellona* from Hamburg to Hiogo, but also that this de-

Beklagten misslungen. Das O. L. G. hat aus dem vorliegenden Beweismaterial die Ueberzeugung geschöpft, dass das fragliche Füllrohr nicht nur schon bei Antritt der Reise der *Bellona* von Hamburg nach Hiogo schadhaft war, sondern auch dass dieser Mangel des Schiffs nicht als ein solcher gelten kann, welcher aller Sorgfalt ungeachtet nicht zu endecken war.

(Wird näher ausgeführt.)

Ist aber davon auszugehen, dass das Füllrohr zum hinteren Peak-Tank by Antritt der Frachtreise der *Bellona* beschädigt war, sei es, dass es bereits gebrochen, sei es, dass es auch nur geborsten war und es erst nach Antritt der Reise in Folge der Bewegung des Schiffs oder aus anderen Ursachen brach, so kann der Beklagten nicht zugegeben werden, dass dies ein Mangel des Schiffs war welcher aller Sorgfalt ungeachtet nicht zu entdecken war. Wie es dem Verfrachter, welcher seiner Verpflichtung, ein seetüchtiges Schiff zu stellen, nachzukommen beflissen ist, vor Allen obliegt, sich zu vergewissern, dass das Schiff in allen für die Aufnahme der Ladung bestimmten Theilen gegen das Eindringen des Wassers von aussen wohlgesichert ist, so hat er auf die völlig seetüchtige Beschaffenheit derjenigen Vorrichtungen sein besonderes Augenmerk zu richten, welche der Durchführung von Wasser durch den Laderaum dienen. Wenn deshalb ein in nächster Nähe eines diesem Zwecke dienenden Tank-Füllrohrs fussender Raumstützen auf der Herreise der *Bellona* gebrochen war, so erheischte es die von der Beklagten nach H. G. B. Art. 560, 607[2] aufzuwendende Sorgfalt, sich zu vergewissern, dass auch das neben der Pfanne des Stützen liegende Füllrohr keinen Schaden gelitten. Auf das Gegentheil durfte die Beklagte, wie schon erwähnt, aus dem Umstand nicht schliessen, dass die Holzverkleidung des Rohrs sich intact erwies denn man musste wissen, das die Holzverkleidung neben der Pfanne, in welcher der Stützen stand, einen Ausschnitt hatte. Wenn der Sachverständige Stammel sich dahin geäussert, dass er sich nicht veranlasst gesehen haben würde, die Holzbekleidung, wenn er sie intact befand, wegreissen zu lassen, so hängt diese Auffassung mit seiner nicht zu billigenden Ueberschätzung der Bedeutung der Unversehrtheit der Holzbekleidung für die daraus zu folgernde Unversehrtheit des Rohrs zusammen. Ein Ausfluss derselben

fect in the vessel cannot be considered one which could not be discovered in spite of all care.

(Treated in detail.)

But if we are to start with the view that the feed-pipe to the after peak tank was damaged at the inception of the freighting voyage of the *Bellona*—also assuming that it was merely cracked, and only broke after starting on the voyage, in consequence of the movements of the vessel, or through some other cause, it cannot however be yielded to the defendant that this was a defect of the vessel, which could not be discovered in spite of all care.

The duty of the shipowner who diligently tries to meet his obligations to furnish a seaworthy vessel, is above all to make sure that all parts of the vessel intended for the reception of cargo are well protected against the entering of water from the outside; *and he must give his especial attention, that all those arrangements are in an absolutely seaworthy condition, which serve to convey water through the cargo space.*

If, therefore, a supporting post, close to where a tank feed pipe serves such a purpose, was broken on the inward voyage of the *Bellona*, the diligence imposed on defendant by Arts. 560, 607 of the Com. Code makes it necessary to assure one's self that the feed pipe lying next to the supporting socket has sustained no injury. On the contrary, as already stated, the defendant should not presume from the circumstance that the wooden casing of the pipe proved to be intact; for it ought to have been known that the casing beside the socket, in which the support stood, had a portion cut out.

If the expert Stammel has intimated that he would not have considered himself bound to have the wooden casing torn away when he found it intact, this view depends upon his over estimate (not to be concurred in) of the significance of the uninjured condition of the wooden casing, from which the uninjured condition of the pipe is assumed.

It would be in line with this view of the expert, on finding the wooden casing uninjured, not even to consider it necessary to examine the socket for possible injury to the same. An inspection of the socket was all the more important because an injury found on it would furnish very good ground for considering it necessary to examine the pipe lying next to it. Engineer

Auffassung wird es sein, wenn der Sachverständige bei constatirter Nichtbeschädigung der Holzverkleidung auch nicht einmal eine Untersuchung der Pfanne auf etwaige Beschädigung für geboten erachtet. Eine Untersuchung der Pfanne war vielmehr um so wesentlicher, weil eine an ihr gefundene Verletzung für die Nothwendigkeit einer Untersuchung des daneben liegenden Rohrs einen besonders beachtenswerthen Anhaltpunk gegeben hätte. Der freilich nicht als Sachverständiger vernommene Ingenieur Robert Pohl spricht sich übrigens in seinem Schreiben, wie schliesslich erwähnt werden mag, gleichfalls für die hier vertretene Nothwendigkeit einer Prüfung der Rohrleitung auf ihre Wasserdichtigkeit nach beendeter Reparatur des Stützen und vor Einnahme der Ladung aus.

Bei nichtgelungener Exculpation der Beklagten wegen der den Gütern der Klägerin in Folge Bruchs des Füllrohrs zugefügten Beschädigung war demnach der Klägerische Auspruch dem Grunde nach als gerechtfertigt anzuerkennen.

Hanseatische Gerichtszeitung, 1891, p. 70.

Robert Pohl, who, it is true, was not taken as an expert, also speaks in his statement, which can properly be mentioned here, in favor of the necessity of testing the pipe as to its water-tight condition, after completing the repairs to the support, and before taking in cargo.

The defendant not having succeeded in exculpating itself for the damage done the goods of the plaintiff in consequence of the bursting of the feed pipe, it was proper to find that the demand of the plaintiff was justified.